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Legacy Labyrinth 2024

Let the Legacy Games begin

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The information and opinions contained in this delegate pack do not constitute professional advice. Specific advice relating to individual matters may be obtained by contacting one of our legal specialists.

Welcome to the Legacy Labyrinth 2024

Let the games begin….

I am delighted to welcome you to Legacy Labyrinth 2024, our annual conference for those working in the charity legacy sector.

The world around us is constantly changing but despite economic and political uncertainties, like any athlete, the legacy market has shown resilience in the face of adversity and charity legacy income reached £4bn in the year 2022/23.

Amidst the legal content, today's theme has a sporting focus and, for me, the Olympics is always a special time - whether you a budding sportsperson, armchair fan or simply enjoy the global festival. With so much uncertainty locally and globally it is a timely reminder of the many bonds we share across race, cultures and languages.

As ever, I know that Paul, Stephen and the rest of the team are delighted to be welcoming you to the two virtual sessions in January and February and look forward to seeing many of you in person in June.

So, once again, it gives me great pleasure to be welcoming you to Legacy Labyrinth and we hope you enjoy the content throughout the three sessions.

Wishing you the best start to 2024. On your marks, get set, go!

Best wishes

Justine Markovitz

Withers LLP Chairperson
Geneva

Artistic Gymnastics

Art issues

Introduction

If your charity is the specific legatee of a work of art or the residuary beneficiary of an estate that includes a work of art, such as a valuable painting, interesting issues can arise that will need careful consideration by your team.

For example, what steps should the executors/the charity take? Who pays the cost of insurance and transport? What happens if the painting has gone missing from the deceased's home?

If your charity is able to sell an artwork received as a specific legatee or as a residuary beneficiary, what are the practical and legal considerations around that? For example, what happens if there are issues around the provenance of the painting?

Executors' duties

Sarah Aughwane's notes (which can be found at ***Jumping the Executor's hurdle***) provide a helpful summary of an executor's duties but, by way of summary, executors' duties are defined in the Administration of Estates Act 1925 and in the Trustee Act 2000.

Executors have a duty to:

a) Safeguard the assets of the estate (s. 1, Trustee Act 2000). This includes providing adequate security safeguards (*Job v Job* [1877])

b) Pay the debts of the deceased

c) Distribute the estate to the beneficiaries of the estate

Insurance generally

Under s.19 of The Trustee Act 1925, executors have the power to insure any property in the estate against risks of loss or damage. However, it is not clear whether there is a duty to insure chattels.

If the executors do decide to insure chattels, they are under a statutory duty to take reasonable care in selecting insurance (Sch.1, para 5, Trustee Act 2000). Where there is a valuable chattel, the executor should check what insurance is in place and that the insured value corresponds to the current market value.

Specific legacies – who pays?

The case of *Clough-Taylor, Coutts & Co v Banks and Others* confirmed the principle that specific legatees should bear the costs of a number of different types of expenditure (for example, packing, transport, insurance, upkeep, care, preservation) for that specific asset.

In that case, the deceased had made a specific bequest of a chattel to the defendant. The chattel was in the deceased's house at her death but was removed by a person who claimed that the deceased had given it to him during her lifetime. He sold the item to a third party.

The defendant contended that the executor was under a duty to collect in the assets of the estate and should take action to recover the chattel gifted to him. The residuary legatees argued that the specific legatee must bear the costs of trying to recover the chattel.

Mr Justice Lloyd said there is a clear principle that specific legatees must bear the costs of a number of different types of expenditure (see above). It was clear that an executor has no duty to take anything other than normal or routine steps to collect in assets and deliver them to specific legatees. The executors are not under a duty to litigate to recover the painting in the case of a gift of that asset to a specific legatee.

Having determined that the chattel was not required for the payment of debts or expenses or any other purpose of the administration, the judge determined that the executor can vest it in the specific legatee by means of an assent. The specific legatee could then take legal action to recover the item at their own personal cost.

Missing artwork

Imagine the scenario where a valuable painting believed to have been owned by the deceased has gone missing and the Executors cannot locate it. What are some of the practical steps that could be taken by the Executors?

a) Check records amongst the deceased's possessions: e.g. insurance documents, valuations, sales' invoice or auction house receipt, catalogues, photographs.

b) Check online sales databases (such as Artnet) to establish whether that painting has been sold by auction (before or after the deceased's death).

c) Consider asking an art historian/dealer/auction house to conduct due diligence and provenance research to establish the likely chain of possession.

d) Search of the Art Loss Register. The ALR in its words, *'maintains the world's largest private database of stolen art, antiques and collectables'.* The ALR can search its database to establish whether the artwork is listed as an artwork with third party interests in it. The Executors can also apply to the ALR to include the missing painting on the Art Loss Register in order to prevent sales by a third party and maximise chances of recovery.

e) If it does appear that the painting has been lost / stolen then the Executor may want to advertise the loss / theft in the Antiques Trade Gazette (or other similar publications). Such publication may also act to inhibit onwards sales.

f) Consider reporting a theft to the police.

g) Consider making an insurance claim. Prior to doing so it will be important to consider if the painting had been insured for its current market value. Consider acquiring recovery rights from the insurer – if you do, and the painting is found, you may be able to claim it back subject to making a payment to the insurer (equal to the insurance proceeds).

h) If the executors are aware of the whereabouts of the painting after a re-sale and it is in England, then they can bring a civil claim in conversion for recovery (and/or damages) against the third party in possession of the painting. Under English law, broadly speaking, title to a stolen artwork will not pass upon transfer of the painting to a third party, including innocent third parties buying in good faith, (but there are exceptions to that principle). However, if the painting was acquired from the thief in good faith, the innocent purchaser will be protected from a claim in conversion after a period of six years from the date of the good faith acquisition. As covered above, executors are not under a duty to litigate

to recover the painting in the case of a specific legatee. However, the cause of action can be assigned to the specific legatee.

Executors will not be liable for any loss of property that arose prior to the administration of the estate, but are potentially liable for loss of the painting during administration as a breach of duty/professional negligence.

Beneficiaries have a right of action known as '*devastavit*' for breaches of duty arising out of the executor's maladministration and misappropriation of the estate's assets. The standard of care required of executors in the performance of duties is 'reasonable' S.1 Trustee Act 2000 and is judged in relation to the knowledge of the executor or to the standards of profession or business

Issues around Selling Art - How to sell art to its best advantage?

Assuming the charity can sell and wishes to sell, how can you sell the artwork to its best advantage?

Who can help you to sell a valuable work of art?

You can sell privately through an art dealer (who may or may not have a gallery) or through an auction house (both of which we will refer to here as a 'selling agent').

An appropriate selling agent would be a reputable dealer or auction house with an existing track record of buying and selling the type of artwork you are trying to sell. Someone without experience in the particular field is more likely involve others in the sales process (often meaning profits and confidential information leak along the sales chain). In any event, in order to prevent such leakage, it is recommended you enter into confidentiality agreements and also a well drafted agency or consignment agreement with any selling agent.

The art market can be riddled with conflicts of interest. In the absence of a trusted friend in the art market to help guide you to the most appropriate selling agent, there are certain art advisers who style themselves as independent and able to act with impartiality. They market their services of going out to each of the main auction houses (and/or perhaps other recommended selling agents) to obtain competing quotes on your behalf. We would recommend checking their terms and conditions carefully and obtaining references, in addition to entering into a confidentiality agreement with them.

How should the artwork be sold

Selling agents (whether dealers or auction houses) will have a view as to what is likely to obtain the best price for your particular work of art (although thought should of course be given to the other factors that might be informing their views). Of course, well marketed auction sales create competition and therefore potentially the highest price, but they also risk the artwork failing to sell and therefore having its value tainted (unless a guarantee agreement can be negotiated with the auction house). On the other hand, if there is a known collector in the space and the selling agent can negotiate a good private treaty sale quickly and discretely (without having to wait for the right time in the auction calendar, and without the risks of publicly failing to sell) then that may also be preferable.

We would advise that you take legal advice on the negotiation and drafting of consignment and guarantee arrangements for auction sales (including negotiating deals to take a cut of the buyer's premium). Additionally, we would also advise that you take advice on the negotiation and drafting of consignment agreements for a private sale arrangement (within which we would recommend the inclusion of a profit share arrangement over and above a minimum net return to the seller).

When and where should the artwork be sold

Your independent art adviser and/or the selling agent will likely have strong views on this. If you decide to sell by auction, much will depend on the auction calendar and the jurisdictions in which those collectors who are likely to be interested in your artwork are located. You may also be advised to wait to sell the work (because, for example, prices are rising steadily or because the market is currently flooded with similar works).

If your work is being marketed internationally, consider issues around the potential for damage in transit, the costs of marketing, the costs of packing, shipping and insuring for that journey. You should attempt to push the related costs on to the selling agent if commercially possible. Also consider the impact of any international laws, and also customs duties and any export restrictions.

Issues around Selling Art – What issues could arise in the course of the sales process?

In selling a work of art, you may come across a number of other issues:

a) Title issues & Restitution

b) Authenticity

c) Other unexpected issues on sale

Family fall-out

The art world is no exception to family fall-outs. While the recent case of *Hilden Developments Ltd v (1) Phillips Auctioneers Ltd (2) Robert Tibbles* did not concern a probate dispute, it is still an interesting example of a family dispute. It concerned litigation around the ownership of a Damien Hirst painting, 'Beautiful tropical, jungle painting (with pink snot)'.

Robert Tibbles bought the painting in 1999 for £68,000, paying in two instalments. The painting hung on Robert's wall for 20 years and he insured it.

In 2014, family relations broke down and "litigation warfare" ensued with Robert's father, Nigel, and brother, Sebastian, making multiple claims. In 2020, Robert sold the Hirst for £350,000. Nigel and Sebastian sued claiming that Nigel had loaned some of the funds to purchase the painting. There were two invoices issued to two BVI companies controlled by the father/brother (the family had frequently used offshore companies to purchase assets in the context of a gallery run by the family) for the painting.

The court found that Robert was the ultimate source of the payments and had always held full title to the painting. Nigel had 'no interest in abstract or contemporary art' and 'no real memory of the details relating to the purchase'. Sebastian 'had no direct knowledge about the purchase of the painting'. The Court went on to award a non-party costs order against Sebastian personally as the 'real party to the litigation'.

Conclusion

Much like the idiosyncratic artworld itself, sometimes there can be surprises when dealing with fine art.

Where your charity is left a piece of work it will be important to take professional advice in order to maximise its potential.

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Diving into data protection: avoiding bellyflops

Data protection: when it's a problem and how to circumvent

Introduction

Plunging into the pool of data protection regulation can seem intimidating. While legacy specialists may not often deal with data protection in their everyday activities, it's important to have a reasonable working knowledge of the basics.

We've had data protection regulation in the UK since the mid-1980s, however data protection only came to wider attention when the EU General Data Protection Regulation (GDPR) – now transposed into the UK GDPR following Brexit and supplemented by the UK Data Protection Act (DPA) – took effect in May 2018. This was largely because of potentially huge financial penalties for non-compliance hitting the headlines. While many horror stories being peddled about penalties for minor infringements were over hyped, the lack of large fines doesn't mean we can think of GDPR as a non-event. We've seen private individuals becoming increasingly aware of their data privacy rights and willing to exercise them, often in the context of a wider grievance. Even if regulatory action is still relatively rare, dealing with a data protection complaint can present an unwelcome disruption.

It's also clear that there are still misunderstandings of how data protection law applies or even a perception by some that it can be avoided (e.g. only dealing with paper records). In our view, a total circumvention approach is not only impractical, it's likely to fail. Most information even if initially given verbally or written down may be ultimately recorded electronically or filed somewhere, meaning that data protection law is potentially applicable.

Rather than trying to swim against the tide of data protection rules, the best course may be to dive in. Normal operations should not be unduly impaired by compliance provided that you are willing to take sensible steps. So, what are our current 5 key takeaways for charity legacy professionals and practitioners to avoid embarrassing or costly data compliance 'belly-flops'? Some of our audience will be more familiar with data protection than others but for everyone, I hope this will provide a useful refresher of key points to remember when collecting and handling personal data in a legacy context.

1. Be aware of what's covered

Data protection legislation regulates the collection and handling of personal data by your organisation (the organisation being the 'data controller', not an individual staff member, as is sometimes the belief). 'Personal data' covers data relating to an identifiable, living individual. A deceased person's data is not subject to data protection law, although other laws such as the Access to Health Records Act 1990 and duties of confidence can still be relevant. In any event, the personal data you hold relating to the legator's family and other relatives, beneficiaries, personal representatives and other individuals – whether in personal or professional capacity – will be regulated under GDPR and DPA. Personal data recorded about your own individual staff or volunteers, internally or in external communications will also be covered. Personal data does not just mean contact details. It can extend to any opinions recorded about an individual, including negative comments in internal communications (e.g. an email or message on your system between colleagues venting their views about a difficult family member). It can also apply to personal data within instant messages and WhatsApp communications sent in a work context. You can't necessarily 'get round' the rules by using messaging services

on a mobile device and, once a data subject access request (or DSAR) is likely to be served, it's a criminal offence for an organisation or staff member to intentionally delete or amend the personal data held with a view to avoiding disclosure.

2. Remember that individuals have rights to see the data recorded about themselves

As said above, individuals can use a DSAR to obtain a copy of the personal data that's held about them by your organisation or staff/volunteers. The exceptions allowing you to reject such a request are limited and the timescales for responding are tight. In many cases, the task of searching for personal data can be resource intensive. We recognise this is particularly acute when you are in an already stretched team. However, lack of resource is not recognised as a legal basis to delay or limit your response. Often, you can procure external IT help in searching for data and filtering 'hits' to more manageable levels. However, prevention is better than cure and having some rules about what staff record (or don't record) about individuals and control on where communications are saved is recommended to reduce the work you have to do later.

At the same time – don't panic if you receive a DSAR. Many individuals (and their advisers) overestimate what they are entitled to see or go on 'fishing exercises'. The data subject access right is not blanket right to see whole documents that an applicant may be interested in. Only information so far as it constitutes an individual's personal data is disclosable.

Also, you have the right to balance the applicant's privacy rights against the privacy and confidentiality rights of other individuals whose details that could also be revealed. We understand that this can be a tricky exercise, but it will often be a relevant consideration where large bundles of communications are being requested. Also, in respect of genuinely 'complex' requests, you can extend the deadline for responding by a further 2 months.

3. Have relevant policies/training for you staff

One of the most important new features of the GDPR was the introduction of an 'accountability' principle. This means that simply saying you are complying with the rules is not enough. You must be able to demonstrate what you are doing to comply. In other words, documenting good data protection practice is essential. There are some 'easy wins' here. For instance, an external facing privacy policy that individuals can access to find out what personal data your charity – including the legacy team - may be collecting about them; what you use it for; who it may be shared with; the legal basis for your processing of that data; how long it will be retained (or the criteria you use to retain data) and what rights individuals have to access their data, object to certain uses or complain if they think their rights are being violated. It's important that you also put in place internal rules for your staff in relation to their handling personal data and that you back this up with periodic training. 'What guidance or training has your client given its staff?' is often one of the first questions we are asked by the Information Commissioner Office (ICO) when they investigate a data incident. What's appropriate will differ for each organisation, depending on its size and complexity of its data processing. However, particular points to remind staff on should include only recording the personal data that's necessary for your purpose; storing personal data/correspondence in the correct places on your system; taking precautions to keep data secure; not sharing data inappropriately (e.g. other than with relevant staff who have a need to know or externally when here is a clear legal justification) and having a process for promptly reporting any suspected security breaches. Keep policies up to date and make sure that they are relevant to legacy operations. Ensure you have appropriate data processor contracts in place with companies that handle any personal data on your behalf or data sharing agreements where you share/receive personal data with/from external parties.

4. Ensure you have a data retention policy

Having a written retention/disposal policy is strongly recommended. This should recognise your other legal obligations (e.g. maintaining transaction records for tax law) and the needs of different teams. There is no set timescale and personal data should only be retained for as long as 'necessary' in connection with the purpose for which it's held. This may mean only a few years for marketing but we're conscious that for a legacy team there may be a need to retain data on a much longer-term basis to establish that your charity had a previous

connection with a deceased individual in case they leave a legacy which is subsequently contested by a dependant under the 1975 Act. This may be justifiable, provided you document your reasons in a retention policy. You should also ensure that such retained data is limited to what you need and safeguarded from being used for unrelated purposes, such as fundraising.

5. Finally - keep an eye on the regulations

UK data protection laws are potentially changing in the near future. The government is about to pass an amended Data Protection and Digital Information Act. The fundamental principles of the GDPR and Data Protection Act should not change radically, but there may be some helpful modifications for charities, notably more flexibility around sending e-marketing to individuals you had previous contact with and potential tightening of rules around DSARs that may allow you to refuse vexations applications not made in good faith or that constitute an abuse of process, although further guidance may be needed on what this means in practice.

Like even the best Olympic diver, when it comes to data protection compliance it's unrealistic to expect a perfect score. However, with due preparation, you should be able to minimise the need to somersault, pike, tuck or twist your way through difficult regulatory issues at a later date.

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The ball's in your court…or is it?

Can I be forced to mediate and reflections on how to make the most of ENE

Introduction

Whilst the courts have long encouraged parties to resolve disputes via mediation, judges were unable to order them to do so – until now.

On 29 November 2023, the Court of Appeal decided in Churchill v Merthyr Tydfil County Borough Council that judges do have the authority to order parties to pursue mediation, as long as they take into account whether that is proportionate and whether it will adversely impact a claimant's right to a court hearing.

Alternative Dispute Resolution ('ADR') is something all litigants need to bear in mind – the Civil Procedure Rules, which govern the conduct of claims, set out the court's expectation that parties should make every effort to settle their case before it is heard by the court – but charities are perhaps particularly motivated to pursue ADR. The Charity Commission's 'CC38: Charities and litigation, a guide for trustees' provides that:

'Unless time constraints for bringing or responding to an action prevent it, the commission will expect trustees to explore and, if appropriate, rule out all other reasonable options open to them to resolve the issue, such as alternative dispute resolution or agreeing a legal compromise.'

How might this fit in with the *Churchill* decision? Here, we consider how the courts might actually approach 'compulsory mediation', and put this into the context of other Alternative Dispute Resolution ('ADR') options such as Early Neutral Evaluation.

I'm considering ADR – what are my options?

Mediation is just one possibility for those looking to resolve a dispute before trial. One important alternative – or something to pursue further down the line, should an early mediation fail – is Early Neutral Evaluation ('ENE').

Mediation and ENE have some similarities, but important differences:

Mediation involves an independent mediator carrying out 'shuttle diplomacy' ie going back and forth between the parties exchanging offers. Mediators' styles vary, but as a rule they are acting as a facilitator, trying to bring the parties closer together (with concessions on both sides) in order to arrive at a mutually agreeable outcome. At least until now, mediation sits outside the court process; mediators have no formal standing and the parties make their own arrangements at whatever stage of the claim they choose. Anything discussed at mediation remains confidential between the parties and the mediator so a judge does not know what happens at mediation or what was aid, only that there was a mediation.

Early Neutral Evaluation (like its sister process 'Financial Dispute Resolution' or FDR) is generally court-assisted, involving a judge who will not be involved the case going forward. It can take place either on paper, or in person at Court. If on paper, the parties will provide the judge with position statements and a bundle. At Court, the parties generally conduct a 'mini trial' in the morning, exchanging submissions but there is no cross-examination or experts.

The outcome is that the judge considers the matter and gives as far as possible their view as to how they see the merits of the case and what they would decide were they hearing the matter at trial. The parties then use the judge's remarks as a springboard for negotiation (often with the judge remaining available to assist if needed).

There is therefore an important distinction between the two, in that mediation is primarily facilitative, and ENE evaluative: a judge tells the parties who they think is more likely to win. Depending on the type of case and the type of claimant, this can mean that a case is more likely to settle at ENE than at mediation, or vice versa.

Can I be forced to mediate?

Until recently, judges were able to order parties to undergo ENE or FDR against their will but, because of the way case law had developed, were not able to make a similar order to mediate. In November 2023, however, the Court of Appeal changed the position:

The court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.

'*Non-court-based dispute resolution process*' includes mediation. The Court of Appeal's decision means that judges can now order parties to mediate and can impose sanctions if they fail to do so, in the same way that parties can be sanctioned for breaching the court order.

One unresolved question is what sanctions will be imposed if a party is ordered to mediate and refuses to do so. Would there be a purely financial consequence? Would staying the claim until the parties do mediate, or even striking out the claim completely, constitute '*impair[ing] the very essence of the claimant's right to proceed to a judicial hearing*'?

What if I don't want to mediate?

This decision is relatively new and it will be some time before we get a sense of how often parties will actually be 'forced' to mediate if they do not want to. Much will depend on the circumstances of the individual case and the party or parties' reason(s) for refusing, of which some are better than others:

There are occasionally parties who resist any form of ADR because they believe strongly that they will win at trial and therefore that there is no reason for them to make any concession at all.

This is risky. As noted above, the Civil Procedure Rules require parties to consider whether ADR would be suitable in their case and, if asked, to provide evidence showing that ADR was considered. The Rules also say expressly that unreasonable refusal to consider ADR can be a factor when it comes to costs orders.

Therefore, even if the party who refuses to pursue ADR does win at trial, the court may still penalise them by limiting the amount of costs they are entitled to recover from the losing party.

Sometimes parties feel that ADR is unlikely to succeed until later in proceedings, for example after disclosure and/or witness evidence has been exchanged. The court may well be receptive to this as long as the parties make clear that they do intend to attempt ADR before trial and they genuinely think the prospects of mediation succeeding will be enhanced at a later date.

The purpose of ADR is to further the overriding objective of resolving cases '*expeditiously and fairly*' and at '*proportionate*' cost. In some cases, although they are likely to be rare, the cost of a formal mediation involving mediator, barristers and solicitors is not proportionate to the value of the claim or the cost of going to trial (for example if the trial is one day or less). An alternative in this situation would be to propose a cheaper alternative such as a solicitor-only roundtable meeting.

Sometimes it is clear from correspondence that the parties are a long way apart on the facts and/or the law. This will mean very different risk assessments and therefore views on what would constitute an acceptable settlement. Mediation, which focuses on negotiation rather than argument and counter-argument about the merits, may not be the best way to close that gap.

One school of thought is that, in practice, judges will be reluctant to order mediation if any or all parties are opposed to it. Mediation is most likely to succeed when all parties want it to work and are prepared to make concessions if necessary to achieve that. Imposing mediation on a party against their will may simply make them even less prepared to cooperate and less open to settlement, in all likelihood rendering the mediation a waste of time.

However, given the Civil Procedure Rules' emphasis on ADR, the best way of averting a 'forced mediation' is likely to be proposing an alternative.

Why choose Early Neutral Evaluation?

ENE can be better suited to some cases than others. The judge in an ENE will not review disclosure in detail or hear live witness evidence, so may be reluctant to express a firm view on disputed facts.

A claim for rectification or construction of a will, for example, generally involves relatively limited documentary and witness evidence. A judge is therefore likely to be able to review all the papers within the time allowed and feel able to indicate how the trial judge will apply the law to that evidence.

Similarly, 1975 Act claims sometimes involve limited dispute about the underlying facts; the claim focuses on how those facts should be balanced against each other and mapped onto the size of the estate. This is an evaluative exercise which is well-suited to ENE or FDR.

However, even in case where facts are disputed, there can be a psychological aspect to ENE which can lead to a breakthrough where mediation would have failed.

Probate claims are sometimes seen as not suitable for ADR because they tend to revolve around witness and expert evidence, which cannot be tested in an ADR context. But ENE can play an important role where a party is unable or unwilling to accept fundamental legal or factual problems with their case. Emotions can run particularly high in probate claims; often, family members are not only convinced that right is on their side, but reluctant to listen to arguments to the contrary from solicitors representing 'the enemy'.

This can be a real barrier to mediation if the family member therefore believes their case is many times stronger than it is and refuses to contemplate settling within the charity's more realistic parameters. The more formal process of attending court for an ENE, and hearing an independent judge express the same factual/legal doubts about their case, can be an important 'wake up call'.

ENE can also be used creatively. In a recent case, for example, Withers successfully proposed a 'binding ENE', akin to an arbitration: the parties agreed to abide by the judge's indication rather than proceeding to trial.

Top tips

Alternative dispute resolution can (and should) be attempted in every case, but that does not always mean mediation. Sometimes another form of ADR will be more appropriate.

ENE is used most often to get a judge's view on discrete points of law, but it can also be useful psychologically where a party has a poor case (legally or factually). The party may well refuse to acknowledge the problems when pointed out by solicitors, but listen to a judge.

If there is a gap in the evidence, a judge will be less likely to give a firm indication. An ENE will therefore be most productive if it takes place after the parties have exchanged all factual/witness evidence. In some claims this may be relatively early; in a probate claim it is likely to be several months into proceedings.

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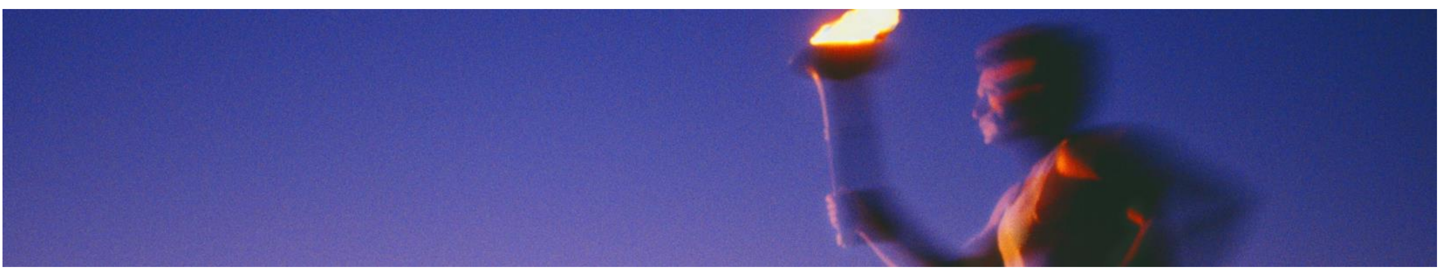

Keeping the games clean

This all looks a bit smelly: how do I know it's legitimate – spotting the fraudsters and avoiding hacking

Introduction

Fraudsters assume that charities are soft targets and are easy to defraud. While they may be wrong about that and you may have good systems or processes in place, this perception means that you will continue to be targeted by organised criminals whose methods are constantly evolving and increasingly effective.

In addition, in this economic climate, while some charities are seeing more people turning to them for help than ever before, many are also seeing more 'one off' attempts at fraud by desperate individuals.

As ever these 'fraud' attacks can be in person or online but there are often some red flags or something which doesn't smell right and this session will try to explore how you can spot those and best protect your charity.

Sometimes the fraud is not directed at the charity but involves use of its name and reputation. This is much harder to spot but can be just as important to stamp out given the reputational harm such crimes might cause including the ability to undermine public confidence in charities and charitable giving.

What is a fraudster?

Fraud is defined as a criminal deception committed by a person who acts in a false and deceitful way. There are a string of offences under a variety of legislation (such as the Fraud Act 2006) and essentially the suspect will demonstrate some form of dishonesty and/or deception.

Fraudsters and the frauds they commit are constantly evolving and there are literally hundreds of different types of online fraud.

How to avoid hackers?

1. Make sure you do the basics as you would at home
2. Update anti-viral software
3. Do what your IT tells you to do!
4. Read your organisations IT or fraud prevention policy carefully.
5. Ensure passwords are complex
6. Avoid public WI-FI when working
7. Avoid clicking on suspicious attachments

The last is the real concern for all of us given the sophistication of what is called phishing attacks. Think about how your role works and in particular how you interact with other external organisations so that you are better prepared to spot requests that are out of the ordinary.

1. Do you know what to do with a strange request and who to ask internally?

2. Do you feel confident to challenge an email from someone (even one appearing to be from a manager in your organisation)?
3. Is this email/request coming at a strange time/when you are rushed/suggesting you must act urgently?
4. Does the tone/content/spelling in the email seem strange?

Is it all about hacking?

In BDO's 2023 Charity Fraud report, 50% of frauds were not online/hacking frauds but personal attacks by 'volunteers' and others, sometimes bad apples in an organisation.

As recently as late December last year members of a criminal gang were jailed after collecting hundreds of thousands of pounds from members of the public at supermarkets on the basis that it was going to Children in Need and other good causes. The leader of the gang lied to many of the charities involved and supermarkets about what they were doing often using threats towards staff of supermarkets when challenged to report them to 'head office.' They were caught and the gang are now serving time.

There is a risk that too much attention is focussed on online frauds and not enough on other frauds perpetrated by individuals you come into contact with as part of your job. The good news is that many of the top tips for preventing or spotting online frauds apply equally elsewhere.

Top Tips and questions for preventing / dealing with fraud

Prevention is always better than a cure. It costs far less to prevent a fraud than it does to pick up the pieces, investigate and remedy one which occurs. Here are our top tips for preventing and dealing with fraud.

1. **Take your time when dealing with financial matters** (donations and transactions). Speed here is when mistakes can be made and is what fraudsters rely upon.
2. **Where possible contact people directly about any financial matter.** Phone/Zoom/Teams is a hundred times better than relying on what is supposedly said in an email. If you are transferring money, phone to confirm details and encourage those sending you money to follow your own processes.
3. **Trust your instincts.** Many of you are on the frontline dealing with numerous stakeholders, donors, lawyers, trustees. If something doesn't feel right or look right to you, it probably isn't.
4. **Act quickly when responding to a fraud**. This will help to minimise the harm and maximise your options.
5. **Don't panic and follow your own internal procedure**. Discovering a fraud can be a good thing because you can then do something about it and protect your charity. Do you know now who you need to inform if you suspect a fraud and who you might need to report to externally?

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Sprinting through the Charities Act

Latest on the amendments relating to legacies under the Charities Act 2022

Introduction

The third wave of amendments under the Charities Act 2022 is expected to come into force in 'early 2024'.

The first and second waves of amendments took place on 31 October 2022 and 14 June 2023 respectively. It is still unclear when the amendments relating to ex gratia payments will come into force; no anticipated timescale has been indicated for this.

A number of the amendments that have been made, and a number that are still due to be made, have relevance to legacies, and will be of interest to those working in or around legacy teams at charities. I'm providing a whistle-stop tour of the amendments under the Charities Act 2022 that, we believe, have most bearing on legacies.

Relevant amendments under the Charities Act 2022 already in effect

Automatic trust corporation status for a corporate charity trustee of charitable trust

A new section 334A(1) has been inserted into the Charities Act 2011 that automatically grants trust corporation status to a corporate charity acting as the sole trustee of a charitable trust.

This amendment is of particular relevance and assistance to incorporated charities that:

a) had not, previously, been granted trust corporation status by the Charity Commission or the Ministry of Justice; and

b) from time to time need to take out grants of representation (which, previously, the organisation would have had to do indirectly by appointing nominees), and/or to give valid receipt in relation to land owned by a trust they are trustee of (which, previously, would not have been possible for the organisation acting alone).

It is important to remember that these amendments do not apply to non-charitable incorporated organisations. So, for example, a non-charitable company that acts as sole corporate trustee of a charitable trust will not enjoy automatic trust corporation status under new section 334A(1).

Permanent endowment developments

'Permanent endowment' is a term which, in essence, describes capital property held by a charity which cannot be spent as if it were income. That can be land, buildings, cash or investments. Charities are only able to use the income arising from property held as permanent endowment to further their charitable purposes, and not the capital.

Legacy gifts of capital assets which impose permanent endowment restrictions usually arise where donors wish to guarantee the long-term preservation of their gift.

The following amendments have been made to the rules relating to permanent endowment under the Charities Act 2011:

a) a new power to allow charity trustees to borrow monies from a permanent endowment fund. This power does not require Charity Commission approval. However, there are several criteria applying to it, including a:

- borrowing limit of 25% of the value of the fund;
- requirement for a repayment plan for any amount borrowed;
- requirement for repayment to be made within 20 years; and
- requirement to seek Charity Commission direction if repayment is not possible within the prescribed timescale;

b) a new Social Investment power for charities which have resolved to take a 'total return' approach to investment (i.e. where any increase in the capital value of investments can be expended as well as the income generated). This allows the trustees of such charities to undertake social investment in circumstances where achievement of a financial return is uncertain or unlikely;

c) a new definition of 'permanent endowment': "*For the purposes of this Act, property is "permanent endowment" if it is subject to a restriction on being expended which distinguishes between income and capital.*"

d) the section 281 Charities Act 2011 power for lifting restrictions for 'smaller' permanent endowment funds is now exercisable on funds up to a maximum market value of £25,000; (the income generated is no longer relevant); and

e) the deadline for objection or requests from the Charity Commission in relation to applications from the trustees of 'larger' endowment funds (i.e. section 282 Charities Act 2011) has been reduced from three months to 60 days.

Clarity that the Part 7 disposal restrictions will not apply to most multiple ownership/beneficiary scenarios

Part 7 of the Charities Act 2011 provides various restrictions for charities when disposing of charity land.

Amendments have been made to section 117 of the Charities Act 2011 clarify that the Part 7 disposal restrictions only apply to land if **the whole of the land being disposed of** is held beneficially by/for a charity. (In relation to a corporate charity, this means land held solely for its own benefit, and in a relation to an unincorporated charity, this means land held in trust solely for the charity's benefit).

The effect of this amendment is that in the majority of multiple ownership/beneficiary scenarios relating to an interest in land for a charity, the Part 7 disposal restrictions will not be applicable. For example, where a charity is one of several residuary beneficiaries of a legacy gift of land (held by them as joint tenants), and that land is being disposed of, the Part 7 disposal restrictions will not apply.

Exceptions to the above position, i.e. where the Part 7 restrictions will continue to apply, are:

a) a charity owns land as one of multiple tenants in common and the charity's share only is being disposed of;

b) a legacy containing an interest in land has been left to a charity, and the executor has appropriated the land to that charity; and

c) a trustee holds an interest in land on bare trust for only one charity, and that land is to be disposed of.

Care should therefore be taken when considering appropriations.

Relevant amendments under the Charities Act 2022 due in 'early 2024'

New rules for lifting restrictions on restricted funds

Currently, two common routes for lifting restrictions applying to restricted funds are by the procedures under section 275 and 268 of the Charities Act 2011. However, changes under the Charities Act 2022 will:

a) remove both the section 275 and 268 procedures; and

b) replace them, and other provisions, with a new wide-ranging power (under a new section 280A of the Charities Act 2011) for trustees to amend the trusts of unincorporated charities, including restricted funds.

The new section 280A amendment power will, if the relevant criteria apply, allow the trustee/s to resolve to amend the purposes of a restricted fund; for example, to widen its purposes. However, the consent of the Charity Commission will be required for an amendment to the purposes.

If a charity has any restricted funds which could be amended under the section 275 or 268 procedures, the charity may wish to consider whether it should act to make such amendments now, in advance of "early 2024" (whenever that may be); i.e. before the new rules come into effect. This is because:

- the section 275 procedure, although it requires notification of a resolution to the Commission and gives the Commission a right to object (within a stated period), does not require the active consent of the Charity Commission; the section 280A procedure does; and

- section 280A requires analysis of the purposes of the relevant fund when it was established, even though in some cases this will be a long time ago and the purposes may in fact have been amended in the intervening period.

Certain statements required in contracts and disposal instruments

Where a legacy relates to land, and where Part 7 applies to the disposal of that land (for example, a legacy gift to one charity, which will wholly own the land), under the current rules a prescribed statement – known as a 'certificate of sale' – must be given **personally** by the trustees in the instrument effecting the disposal.

Amendments made under the Charities Act 2022 to section 122 of the Charities Act 2011 will require that a prescribed statement is made **on behalf of the charity** in a contract for sale (if any) and in the instrument effecting the disposal.

Although this amendment effectively adds to the administrative burden by mandating statements at the execution stage and also at the completion stage, it is worth bearing in mind that:

a) it is quite common practice currently for contracts for sale to contain the 'certificate of sale';

b) the requirement that certain statements be given by the trustees personally has been removed, meaning that staff of a charity with relevant delegated powers will be able to approve these statements; and

c) changes already in effect (as of 14 June 2023) mean that the requirements for the scope of the advice that must be obtained and considered under section 119 of the Charities Act 2011 has narrowed, and there is now a wider pool of persons authorised to give such advice.

Added reassurance for legacy gifts to a charity that has merged with another charity

The Charities Act 2011 will be amended so as to enable a gift to an "old" charity, which has merged with a "new" charity and the merger has been registered on the Commission's list of mergers, to take effect as a gift to the "new" charity.

This provision will apply even where a legacy gift is worded so as to require that the "old" charity must be in existence on the date that the gift takes effect. The provision will apply to gifts made after the amendment comes into effect, even if the will in question was executed prior to this date.

This will give legacy teams real reassurance that, provided a previous merger has been properly registered with the Commission, the "new" charity should not meet with challenges from executors in attempting to receive a gift to the "old" charity.

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Jumping the Executors hurdle

What exactly are an Executor's obligations?

Introduction

In the vast majority of estates beneficiaries enjoy a positive and productive relationship with the executor. But sometimes dealing with executors can be frustrating or even concerning. Some executors may be innocently unaware of their obligations. Others may be overwhelmed and unable to focus on their responsibilities. And there are those who are struggling with a conflict of interest or choose to deliberately deviate from their obligations at your expense. Knowing what you are entitled to expect from an executor (or a Personal Representative to whom the same principles apply) can help you to judge when you should intervene.

Accepting the role

An executor does not owe any particular obligations to the deceased's estate, its beneficiaries or the creditors unless / until they take steps in relation to the estate, known as intermeddling. However, once an executor has intermeddled, they are deemed to have accepted the role and certain consequences kick in.

a) They are deemed liable for the assets which have come into their possession (section 28 of the Administration of Estates Act 1925).

b) They are deemed liable for the inheritance tax (IHT) due on the assets they have handled (section 199(4) of the Inheritance Tax Act 1984).

Grant of Probate

Technically, an executor could administer an estate without a grant but, in practice, executors need a grant to prove title.

Providing an account to HMRC

If an executor wants to obtain a grant, they have to produce one of the following:

- an IHT account, certified to show that the tax has been paid or that none is payable, or
- necessary information to show that it is an 'excepted estate', i.e. one where a full IHT account is not required because the gross value of the estate is less than the nil rate band (which is currently £325,000), the estate is exempt or the deceased was non-UK domiciled.

Therefore, an executor needs to gather the necessary information about the deceased's estate and, where an IHT account is required, deliver that information to HMRC (using form IHT400), and pay any tax due (section 226(2), IHTA 1984).

If no account is required because the estate is excepted, the executor should use form IHT205 to submit the information (and, where there is a claim to transfer the deceased's unused nil rate band, form IHT217).

Where an estate is not an excepted estate, the executor must deliver the IHT account within twelve months of the end of the month in which the deceased died or within three months of taking up his appointment (section 216(6) of the Inheritance Tax Act 1984). Penalties may be chargeable if this time limit is not met.

Where the executor reports a taxable estate after the six-month period beginning from the end of the month in which the deceased died, interest is added to any IHT due, beginning on the first day after the six-month period has elapsed.

However, HMRC will often show leniency where there is legitimate reason for delay, such as a particularly complicated estate. In such circumstances, an executor should communicate with HMRC, and potentially file an incomplete IHT account with a covering letter explaining the circumstances, to avoid interest and penalties accruing.

Delay in obtaining a grant

There is no liability in negligence for delay in obtaining a grant (*Re Stevens* [1897] 1 Ch 422 (Ch); [1898] 1 Ch 162 (CA)).

But, where an executor has taken some steps relating to the estate (known as intermeddling) but, six months after the death, has still failed to take steps to obtain a grant, anyone with an interest in the estate can issue a citation under rule 47(3) of the Non-Contentious Probate Rules 1987. If the citee fails to enter an appearance or to comply with the citation, the citor can apply by summons to a district judge or registrar to ask:

- That the citee be required to take a grant in a specified time, or
- For a grant to the citor or some other person specified in the summons.

Citations may not be appropriate if the executor has a legitimate reason for the delay, for example a particularly complicated estate. Where the delay is unreasonable, or there is reason for suspecting that the citee may delay further in the administration or may commit a devastavit (a wasting of estate assets) in the process, it may be more appropriate to apply to pass over the executor under section 116 of the Senior Courts Act 1981 or section 50 Administration of Justice Act 1985.

Executors' administrative duties

On obtaining a grant, an executor (under section 25 of the Administration of Estates Act 1925) takes on the following duties:

a) Collect and get in the real and personal estate of the deceased and administer it according to law.

b) When required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court.

c) When required to do so by the High Court, deliver up the grant of probate or administration to that court.

These duties only extend to the property covered by the grant. Therefore, if an executor obtains a grant of probate relating only to the English estate, they will not have a duty to collect in, or give an inventory of, any foreign property.

Statutory duty of care

In addition to the specific duties set out in section 25 of the Administration of Estates Act 1925, executors are also bound by the same statutory duty of care as trustees (section 35(1) of the Trustee Act 2000). Therefore, when exercising any power listed in Schedule 1 to the Trustee Act 2000 (which includes investing, acquiring land, insuring, delegation, amongst others), unless the will modifies the duty of care, an executor must:

"*exercise such care and skill as is reasonable in the circumstances, having regard in particular to any special knowledge or experience that he has or holds himself out as having, and if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession*".

(Section 1 and paragraph 7 of Schedule 1 of the Trustee Act 2000)

Estate Accounts

Although section 25(b) of the Administration of Estates Act 1925 is framed in terms of providing an inventory or account to the court, executors are expected to keep estate accounts and make these available for inspection to anyone with an interest, a potential interest or a contingent interest in the estate.

An inventory generally contains a full list of all of the assets (including chose in action) and their values due to the estate at the date of death. An account looks at the steps taken by the executor in the administration of the estate.

Executors may charge for reasonable copying costs.

Distribution of assets

Section 44 of the Administration of Estates Act 1925 states,

"*… a personal representative is not bound to distribute the estate of the deceased before the expiration of one year from the death*".

This is known as the "executor's year". This means that an executor cannot be forced to distribute before the executor's year is up irrespective of what is said in the will about distribution within a shorter period of time.

Even after the year's end, a court will not order distribution if the executor can show that there are good reasons for retention and the executor is acting honestly. This is the case even if the value of the asset falls during the period when distribution is postponed; that is unless there was wilful default (*Re Chapman* [1896] 2 Ch 763, at page 782).

But this does not mean that an executor must retain assets needlessly just because the year has not expired. If the estate is ready to be distributed (either because the debts are paid or a sufficient sum is set aside to pay them), the sums remaining should be paid out to the beneficiaries.

An executor must generally provide an explanation to the beneficiaries if distribution is delayed after a year. But this is not the case if the will specifies that assets can be retained or conversion postponed. In those circumstances, it seems that the executor must have acted in bad faith to be fixed with liability (see *Re Norrington* (1879) 13 Ch D 654).

A common reason for delay is to allow for the possibility of a claim being brought in relation to the estate. An executor will often be unwilling to distribute within 10 months of a grant because of the possibility of a claim under the Inheritance (Provision for Family and Dependants) Act 1975. When an executor is refusing to distribute your charity may want to consider whether an indemnity would be appropriate.

Conflicts of interest

Individuals are permitted to act as executor in estates from which they benefit, can give rise to a conflict of interest. Executors are not allowed to prefer their own interests over the interests of the other beneficiaries.

Limitations

Until the assets in an estate are vested in a beneficiary (ie distributed), the property is entirely owned by the executor. An executor does not need to act on beneficiaries' instructions.

Entitlement to information is governed by the nature of your interest: If you are entitled to a particular item or a small gift, you should be given information relevant to your legacy. But you will not usually be privy to other terms of the Will or to wider details of the estate's assets.

If you are due to receive the residuary estate rather than a particular item / cash legacy you have a stronger claim to information.

Executors are entitled to retain legal advisors to assist them and it is for the executor, not the beneficiary to police the costs of doing so. A beneficiary is entitled to be satisfied that fees charged to the estate relate to the estate, but it is more difficult to challenge the quantum or reasonableness of costs. That is for the executor to do.

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Making sure the baton's not dropped

What are my options with difficult Executors

Introduction

There are many types of executors. You hope for the gold standard of executor: fantastically competent, reasonable and efficiently deals with all and any issues. But as many will know, unfortunately, that is not always what you get.

If a person has agreed to act, you would hope that they have a genuine desire to put into effect the terms of the Will. But good intentions only get you so far. You may have found such well-intentioned executors quickly become 'difficult' if they have been misinformed or misunderstand key obligations, facts and legal rules. That can be even harder to navigate where an executor wears multiple hats and needs [reminding] to keep their roles separate.

Other times you may find progress on the administration is frustratingly and unnecessarily slow. Executors can become difficult to get hold of and trying to pin down information, timeframes and updates may seem like an almost impossible task. Disinterested and idle executors can cause a lot of grief!

Others will start off well, are swift to action and get things done. But when the invoices come in the price is eye-wateringly and disproportionately high. Competent but excessively expensive executors create a different set of difficult questions. Do you raise concerns early and risk offence? Or wait until the administration is safely complete before challenging costs? And what, if anything, can you do about it?

First steps

Keeping executors 'on side' wherever possible is good idea. If you can talk them into co-operating and progressing the estate, that is the best approach (hopefully saving you time, stress and reducing any cost and reputational risk). Particularly where lay executors are involved, you are likely to be more knowledgeable on executors' duties and how estate administrations work. A gentle but firm letter reminding executors of their obligations, correcting any misunderstandings and, if appropriate, suggesting they obtain legal advice to assist them in their role is a good first step.

If, after repeated attempts to engage with them, executors remain stubbornly entrenched you may want to consider escalating the issue. That may mean a solicitor's letter. Ultimately, it may require a court application.

Requiring executors to take out the grant

Getting a disinterested or idle executor to engage and apply for the grant of probate can take work. If they show little interest in making the application, you may need to force their hand by issuing a citation.

With any executor, you should first ask whether there is a good reason why they are holding off applying for the grant e.g. a will validity concern. If there is a good reason, they ought to be explaining their reasoning.

If there is no good reason and you wish to issue a citation, the first step will be to put down a caveat. The next step will be to issue the citation with a supporting affidavit and to serve it personally on the disinterested executor. Two types of citation are relevant here: (i) to accept or refuse a grant; and (ii) to take probate.

If a named executor makes no attempt to engage with the estate and, pursuant to the order of priority set out in section 2 of the Non-Contentious Probate Rules 1987, you are next in line to take out the grant (such as a residuary beneficiary), you can issue an 'Accept or refuse a grant'. In essence it tells the difficult executor 'take out the grant or I will'. If the executor does not respond (ie does not enter an appearance) or if they renounce their role, their rights to administer the estate cease (section 5(ii) of the Administration of Estates Act 1925) and you can proceed to take out the grant.

If you are a beneficiary but those ahead of you in the order of priority refuse to issue the citation or act, you should ask them to formally renounce so that the role can pass down the line.

If your disinterested executor has intermeddled in the estate (ie holds themselves out to be an executor, for instance by collecting and managing assets, paying debts), but fails to apply for the grant within six months of the death, you can consider issuing a citation requesting they 'take probate'.

Unlike the 'accept or refuse' citation, a citation to 'take probate' can be issued by anyone who has an interest in the estate. The cited executor must then enter an appearance or comply with the citation. If they do not, you can apply by summons for either (i) the cited executor to be required to take the grant out within a specified time; or (ii) for the grant to be made to you (or another who is specified in the summons).

Order for production of the will

It is unusual for an executor to withhold documents and information for malicious reasons. More often than not the refusal comes from a misunderstanding of their duties (or, where they wear multiple hats, a failure to separate out their different roles).

If an executor refuses to disclose a will to which you are properly entitled, the court can issue a subpoena requiring disclosure. If the executor still fails to comply, this can be backed up by an application for a summons which raises the stakes for non-compliance to the executor being held in contempt of court and facing the risk of imprisonment. Of course, if litigation is imminent or underway, the usual disclosure rules apply (under the pre-action protocols and CPR 31).

Order for an accounts

Where executors are withholding or being difficult about providing financial information, this can often be resolve by explaining their duties clearly to them.

However, if the executor still refuses to provide accounts, consider issuing a claim for an account under Part 64 of the Civil Procedure Rules ('CPR'). The application requires an application form and a supporting witness statement setting out the material facts and the remedy you are seeking. The Court will normally give the executors a window of time to produce the accounts.

Once the accounts and any evidence in support have been produced, any concerns you have can be raised with the Court. For instance, you may have concerns over improper expenses / fees being claimed, over undervalued or missing assets or you may wish to question steps taken in respect of an asset. The Court will review the evidence and produce 'approved' accounts. Any necessary orders for the estate to be reconstituted or distributed can be made.

The usual application is for 'common account'. It does not allege particular wrongdoing by the executor, save their failure to account for the estate assets.

The alternative is an account based on 'wilful default'. In contrast to an application for a 'common account', the Court can order an account of what the estate might have received if not for the executors' wilful neglect and default. However, an application for this type of account has a considerably higher threshold, requiring you to show that the executors knowingly and of their own free will breached their duties. You must also show that (i) the executors' act or omission was not reasonable in the circumstances and (ii) that the "*the past conduct of the trustees is such as to give rise to a reasonable prima facie inference that other breaches of trust not yet known to the plaintiff or the court have occurred".* Strong evidence will be required to convince the Court to make this order and it is rarely used.

Delayed distributions

The 'executor's year' (see ***Jumping the Executors hurdle***) means that executors cannot be ordered to distribute assets within one year of the deceased's date of death. Of course, there may be good reasons why the administration takes longer (for instance, if the will requires assets to be retained for a longer period, if the estate is complex, or if it involves (the threat of) litigation). If the concern is the threat of potential claims against the estate, agreeing to grant the executors an indemnity in exchange for them distributing the estate may resolve the issue.

However, if your disinterested or idle executor refuses to provide a good explanation for the delay or if the good reason ceases to exist (for instance, a claim against the estate settles), you may want the Court to intervene. Where, on consideration of the circumstances, the Court determines there is no good reason for the delay, the Court can compel executors to transfer assets under sections 44 to 53 Trustee Act 1925.

If the executor's delay causes the value of your legacy to decrease, unfortunately you will only recover the lost value if you can show it was caused by the executor's wilful default (for more on this, see below).

Improper distributions

Where you have a misinformed executor you may be concerned that distributions are made improperly, for instance if the executor misunderstands the effect of certain provisions. One would hope that correspondence would resolve this.

If the executor is threatening to wrongly distribute assets (or they have wrongly distributed assets and the recipient is a flight risk), it may appropriate to apply for an injunction to prevent (further) dissipation of assets (*Re Moore's Goods* [1888] 13 PD 36).

If the executor has distributed assets to the wrong person, whether another beneficiary or a third party, provided they were transferred rather than sold, the Court has power to make right the wrongful distribution. For instance, in order to give effect to the correct beneficiary's rights over the asset, the Court can order it is sold, mortgaged, transferred. It can also declare that the recipient holds it on trust for the beneficiary.

If an asset was sold, the Court cannot prejudice the rights of the (innocent) purchaser (ie it cannot force the asset to be returned to the estate). However where the asset was given as a specific legacy, the beneficiary can receive the sale proceeds. If the executor's action caused loss (eg it was sold at an undervalue), you can bring an application to hold the executor personally liable (see 'Actions against executors' below).

Court guidance

Where it is unclear how an executor should properly proceed, Part 64 of the CPR enables an application to be made to Court for a determination. The question must arise in the context of the administration of an estate or in the execution of a trust but can cover a wide variety of questions. For example, you may want to ask the Court to determine:

1. who is included in a class (e.g. of beneficiaries, or of potential claimants);
2. any question as to the rights or interests of any person claiming to be a beneficiary;
3. whether an alleged debt is actually due; and
4. whether a proposed sale should be made or compromise entered into.

It can also be used to ask the Court to take over the administration of an estate (see below).

Given its scope, Part 64 applications (or the threat of them) can be incredibly useful in persuading misinformed or idle executors to focus on an issue and comply with their obligations.

An application under Part 64 can be relatively straightforward to produce, with a claim form supported by a witness statement setting out the material facts and any supporting evidence. However, caution should be exercised as to the proportionality of taking an issue to Court.

Removing difficult executors

If your difficult executor fails to properly administer and progress the administration, or proves themselves unable, unwilling or unfit to act, you may need to consider applying to remove them. You have several options open to you. But before proceeding with any of them you should give careful consideration to the consequences, particularly the question of who replaces them. If your charity and the other beneficiaries are unwilling to act, can the estate afford the costs of a professional?

If it does become necessary to remove an executor (and appoint someone else), applications can be made under section 116 Senior Courts Act 1981 (if pre-grant) and under section 50 Administration of Justice Act 1985 (either pre or post grant).

Section 116 can be used by any interested party (including those with claims against or out of the estate) to apply to the Probate Registry for someone else to be appointed in place of the difficult executor. If the grant has been issued, applications should be brought by beneficiaries and (co)executors under section 50 Administration of Justice Act 1985.

The Court's power to remove an executor is a discretionary one, but the starting principle is that the Court must be guided by the interests of the beneficiaries. However, weight is given to the fact the executor was chosen by the deceased. Where an executor's acts or omissions endanger the estate's assets or show a lack of honesty or capacity, this can justify their removal. If there has been a breakdown in relationship with the beneficiaries, you will need to show it is sufficiently serious as to be obstructing (or capable of obstructing) the estate administration.

Applications under section 116 and section 50 must be supported with a witness statement setting out your reasons for the application.

Challenging costs

Unless the Will specifies otherwise, executors can only charge for out-of-pocket expenses. They can, however, instruct professionals to assist them in their role and charge the cost of doing so to the estate. If you are concerned that a lay executor has been improperly charging, you can apply for an account and ask the Court to scrutinise the costs (see above).

If the executor themselves is a professional (specialising in estate administration), the will may give them permission to charge reasonable fees and settle those fees from the estate. In such circumstances, the executor is the individual named and they are in effect instructing themselves, or their firm, to act in the administration of the estate. This can seem self-serving, but just as above, the residuary beneficiaries are able to challenge the executor's costs if they are concerned that the fees are unreasonable. The Solicitors Act 1974 give a broad power to request a detailed assessment (i.e. review) of solicitors fees. The power to challenge costs applies even where the executors have already approved the invoices (*Kenig v Thomson Snell & Passmore LLP*, 2023 EWHC 181 SCCO).

Actions against executors

If your difficult executor has acted improperly and / or has breached their fiduciary duties, you can seek to hold them accountable.

Where their actions have caused loss to the estate, they have gained for themselves an unauthorised profit or they have made a transaction in breach of fiduciary duty, as a beneficiary you may bring a 'devastavit' claim. The application can cover misuse of assets (for instance, the executor improperly using assets for their own benefit), the executor not following the Will's provisions, maladministration, breaching their duties and negligence.

If you are successful in your claim, the court should hopefully order the executors to make good the loss and account for unauthorised profits.

Where transactions were made in breach of their fiduciary duties, the transactions can be voided.

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Team USA

US estates

Introduction

Many charities that are primarily based in the UK receive gifts from benefactors who are based in, or have a connection, with the USA. What are some of the issues that you need to consider in such situations?

US Estates

What do we mean when we say there is a 'US Estate'? Technically, the US tax code defines a US estate as a taxable person subject to US income taxes but that is not the type of US estate that we typically mean in the context of legacies. Very generally, when we refer to US estates, we mean either:

1. A legacy of property from a US person deceased. whether the property is in the US or not; or
2. A legacy of property in the US from a non-US person deceased.

The US tax treatment of these legacies are very different and that difference is the focus of our session today. Note that many US documents will refer to the deceased as a 'decedent'.

Legacies from US people

Who is a US person?

Before diving into the specific tax treatment of legacies from US people, we need to first define a US person. The definition of a US person varies depending on whether you are referring to income tax or transfer tax (i.e., gift and estate tax). Common to both tax regimes is that US citizens, regardless of where they are resident or where their assets/property are located, are subject to US income taxes and US transfer taxes on a worldwide basis. US citizenship, generally, is (i) obtained at birth, either by virtue of being born in the United States or by 'inheriting' citizenship from a US citizen parent, or (ii) obtained by naturalisation. Regardless of how it is obtained, US citizenship sticks until it is formally relinquished usually at a US Embassy; the expiration of a US passport is not sufficient to shed US citizenship.

The definition of a US person then differs between income tax and transfer tax as among non-US citizens. For income tax purposes, US green card holders and US residents spending a certain number of days in the US during the year will be subject to US income tax on a worldwide basis, although green card holders resident outside of the US may have treaty positions available. For transfer tax purposes, US green card holders and anyone considered 'domiciled' in the US will be subject to US transfer tax on a worldwide basis. US green card holders are presumed domiciled in the US even if not resident in the US at the time of death, although, again, treaty positions may be available. For those residing in the US without citizenship or green cards, the determination of domicile is highly fact-specific and typically is undertaken by the executor of the estate.

In the context of legacies, we are primarily concerned with whether the deceased is a US person for transfer tax purposes, as the primary tax concerns will be in relation to US federal (and possibly state-level) estate tax. Once we have determined that the deceased was in fact a US person for transfer tax purposes, we can then determine the tax treatment of any charitable legacies from the US person's estate.

In most cases, we will look to obtain a US estate tax charitable deduction (the equivalent of IHT relief) on any legacies being left to charity. Very generally, in order for the US estate tax charitable deduction to apply to gifts from a US person deceased, the gift to charity must:

- Be fixed in the will or trust, either by reference to a value, percentage or residue of the estate, and not subject to the discretion of an executor or trustee; and
- Be limited to charities that qualify under Section 2055 of the Internal Revenue Code.

Provided a US testator has been properly advised on the execution of their will, then the US estate tax charitable deduction should be available on any charitable legacies. Importantly, the charities that qualify under Section 2055 extend beyond US charities and most charities in the UK will qualify for this definition.

For non-US charities, such as UK charities, however, executors based in the US may request a legal opinion that the UK charity does in fact qualify under Section 2055. Many executors will initially request that the charity in question obtain a determination from the IRS that the charity is exemption under Section 501(c)(3). There are some non-US charities that have pursued and received determinations from the IRS but this is not necessary for Section 2055 purposes in the vast majority of cases. A qualified US lawyer can provide a written opinion, as I have done on many occasions, that the non-US charity qualifies under Section 2055 and thus the charitable legacy can benefit from the US estate tax charitable deduction.

But what if either condition above is not met? What happens more commonly when US persons resident outside the US create, for instance, a UK will, that first condition is not met since the will relies on the executor or trustee to appoint assets to charity using discretionary powers, as is common in UK testamentary planning. Unfortunately, the US does not recognise deeds of variation so that will not cure the fault in the will. What might save us is the fact the US provides for a very generous estate tax exemption, assuming the deceased did not make significant gifts during their life. For 2024, the US estate tax exemption, meaning the amount that can pass tax-free to anyone the deceased chose, is US$13.61m. Compare this to relatively meagre UK inheritance tax exemption at death of only £325k. For the vast majority of US people, this means that no US estate tax will be due regardless of who the beneficiaries of their estate are. However, it should be noted that the US estate tax exemption amount is scheduled to decrease at the beginning of 2026 to US$5m indexed (likely putting it somewhere between US$7m and US$8m). From that point, ensuring that charitable legacies qualify for the US estate tax exemption amount will be more critical.

Legacies of US assets from non-US people

The rules regarding charitable legacies from non-US people differ significantly to the rules above for US people. Returning to our definitions of US people, if we determine that the deceased was a non-US person for transfer tax purposes, we still have US estate tax considerations if the legacy is of US assets. US assets include all property situated in the US, including tangible and real property, as well as stock of US corporations (such as Apple or Microsoft), even if these stock investments are held in account custodied outside of the US. One large exception is that simple cash bank accounts located in the US are NOT considered US situs for US estate tax purposes.

Most commonly, a non-US person will own something like real property (think, vacation home in Florida) or investments in US companies, which they gift under their will to a charity. Similar to legacies from US people, the gift to charity must be fixed in the will and not subject to the discretion of an executor or trustee (or beneficiary). But that is effectively where the similarity ends.

While the US estate tax charitable deduction for US people is governed by Section 2055, charitable legacies by non-US people of US assets is governed by Section 2106, which requires that such charitable legacies must be made to US charities. Thus, any legacies made to non-US charities will not qualify for the US estate tax charitable deduction. Further, non-US people do not get the benefit of the generous US estate tax exemption amount and are instead limited to a measly US$60k exemption on US assets. That is not a typo; it is even less than the UK inheritance tax exemption at death. Therefore, it is absolutely critical that any non-US people with US assets take proper advice on their estate planning to ensure their estate does not end up with a 40% US estate tax charge on a charitable legacy.

So what can be done to rectify the situation when proper advice has not been taken and the deceased is already, well, deceased? As mentioned previously, the US does not recognise deeds of variation so correcting the will is not an available option. The only potential saving grace in this situation is the existence of an Estate and Gift Tax Treaty between the US and the country of the deceased's domicile. In the case of the UK and those domiciled in the UK, there is a treaty available that can provide some relief.

First, the treaty acts to effectively exclude certain US assets from the scope of US estate tax for deceaseds that are either domiciled or deemed domiciled in the UK for inheritance tax purposes. Under the treaty, only US real property and US business property will be subject to US estate tax for qualified decedents. Crucially, investments in US companies, that would normally be subject to US estate tax under the US domestic rules, are excluded from US estate tax under the treaty with the UK. This means that, for instance, a gift of US stock to a UK charity by a UK domiciliary will not be subject to US estate tax. The only tax concern then will be ensuring the legacy qualifies for exemption from UK inheritance tax.

In addition, the treaty can provide some US estate tax relief even if the US asset is subject to US estate tax as in the case of US real property, a common asset for non-US people to own. Although non-US people typically only have a US estate tax exemption of US$60k, the treaty between the US and the UK allows a UK domiciliary to claim the full US estate tax exemption available for US people, provided the UK domiciliary reports and pays US estate tax on their worldwide estate.

By way of illustration, let us assume a UK domiciliary passes in 2024 owning real property in the US worth US$1m and a mix of assets in the UK worth the equivalent of US$10m and leaves their entire estate to a UK charity. Under the US domestic rules, without regard to any treaty, the gift of US real property does not qualify for the US estate tax charitable deduction (even though the deceased's estate presumably will qualify for full UK inheritance tax exemption), and US estate tax will be due at a rate of 40% on the value of the US property over US$60k - US$940k x 40% = US$376k. This comes straight out of the legacy that would otherwise pass to the UK charity. However, with the benefit of the treaty, the executor can file a US estate tax return reporting the entire value of the estate (US$11m), which would be within the available US estate tax exemption for US people in 2024, and no US estate tax will be due. While the US estate tax exemption remains high, this can be an excellent solution for estates of UK domiciliaries. However, as mentioned above, there is a scheduled decrease to the US estate tax exemption in 2026 and this option will be less attractive to global estates in excess of that amount.

How to get the planning right from the start

Much of the discussion above is about solving for issues that arise when a will has not been properly advised or drafted. But with some consideration in advance, unintended tax costs can be avoided and a testator's wishes can be fulfilled through their charitable legacy.

What you may have noticed from the rules set out above is that the US and the UK rules both have a strong preference, and sometimes a requirement, for their respective domestic charities. For a US person also treated as domiciled in the UK, a legacy to a UK charity can qualify for tax relief in both countries but additional work will be required to establish its eligibility for US estate tax purposes. For a UK domiciliary with US assets, we actually have a requirement for a US charity for US estate tax purposes but will also have a requirement for a UK charity for UK inheritance tax purposes. The only solution, therefore, is a charity that can be both.

In both cases, what will greatly simplify administrative matters and automatically provide the right tax relief is for testators in either situation to make their legacies to a dual-qualified charity. That is a charity that is considered to be both a US charity and UK charity under the respective domestic rules. The basic structure of a dual-qualified charity is a US 'parent' charity that owns the single share of a UK 'subsidiary' charity.

What makes this structure work is a special tax election that allows the UK charity to be disregarded for US tax purposes. A legacy to a dual-qualified charity will then simultaneously qualify as a gift to a US charity and a gift to a UK charity.

There are a number of dual-qualified charities now in existence, many of the set up and advised by Withers, with the very first one now more than 20 years old. Some dual-qualified charities are operated by specific charities, whereas others are operated as donor-advised funds, which can be utilised to support a wide range of charitable organisations. It is well worth considering whether a legacy to a dual-qualified charity is more appropriate than a legacy to either a solely US or UK charity.

Key takeaways for you, as legacy officers:

1. Was the deceased a US person or non-US person, as this will affect the exact rules that apply for US estate tax?
2. If the deceased was a US person, are you being asked to produce a letter from the IRS when you could instead produce a letter from a friendly US lawyer that does not require the full obligations of IRS registration?
3. If the deceased was not a US person, is there a treaty in place to mitigate the impact of a potential US estate tax charge?
4. Many US-based advisors and executors/trustees are not familiar with these international issues, including the qualification of non-US charities and the impact of treaties. When in doubt, ask an expert!

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It's a marathon, not a sprint

Foreign assets: what are an English Executor's obligations

Introduction

Increasingly your charities are beneficiaries of estates with international aspects. Your charity may be based in England and Wales (or the UK), but the legacy or share of residue your charity is left under a will may be in respect of assets anywhere in the world, whether, for example, a villa in Spain, investments in Dubai or bank accounts in California.

Collecting in foreign assets (or getting them liquidated) and advancing matters to the stage where distributions are possible can add further steps and complexity to an otherwise domestic estate administration.

For example, which nations law governs the administration of the particular assets and, if different, which law determines who is entitled to them? Where there are multiple wills, do they deal clearly with assets in different jurisdictions, or do later wills inadvertently revoke earlier ones? Is your charity's legacy subject to tax where the assets are located? Do local forced heirship rules mean that your charity is to receive less? These are just some of the additional issues which arise in relation to legacies of foreign assets.

At the initial stage, however, your charity will want to know who is supposed to deal with the foreign assets and, in practice, who can deal with them. This note focuses on key aspects of what the executors of the will under which your charity benefits are obliged to do, what they ought to do and what they shouldn’t do in respect of foreign assets.

Is an English executor obliged to administer assets abroad?

Executors may assume that it is their role to administer estate assets wherever they are located. However, there are practical and financial implications to consider: foreign assets may not pass to them, their English grant of representation may not be recognised abroad, and they may not be entitled to reimburse themselves from the estate for liabilities they incur in relation to assets that they are not obliged to administer.

The starting point in considering the scope of executors' duties to administer estate assets is section 25 of the Administration of Estates Act 1925. Section 25 obliges executors to 'collect and get in the real and personal estate of the deceased and administer it according to law'.

You will see that this does not expressly deal with the location of the 'real and personal estate'.

However, there is ambiguity because the statutory provisions which introduced section 25 in its current form states that it shall 'extend to England and Wales only' (sections 9 and 14(3) of the Administration of Estates Act 1971). This can either mean that the duty in section 25 extends to estate assets in England and Wales only or that only executors in England and Wales are under this duty.

The need for caution is highlighted by case law. The court has said that executors do not have a duty to get in all assets – even in England and Wales – where specific assets are left to beneficiaries and are not required for the estate administration (*Coutts & Co v Banks* [2002] EWHC 2460 (Ch)). The court has also said that

executors may be obliged to get in foreign assets if they are needed to pay UK debts where English assets are insufficient (*Re Fitzpatrick* [1952] Ch 86, [1951] All ER 949).

The latter case came before the 1971 Act above and matters have of course developed. But the overall message from these two cases, that it is likely to depend on the circumstances of the particular estate, remains.

Ultimately, the prudent way for executors to proceed is on an asset-by-asset basis, in difficult or appropriate cases seeking the consent of all beneficiaries or even applying for the court's directions before taking steps.

Is an executor entitled to deal with foreign assets?

In common law jurisdictions like England and Wales, the deceased's estate is held automatically by the appointed executors and, after collecting in the assets and paying liabilities, it is their role to distribute them to the beneficiaries. In civil law jurisdictions, like France and Spain, the estate passes directly to the deceased's heirs.

In practice, even in England executors are likely to need a grant of representation before they can deal with the assets. Third parties will want to rely on there being a grant before dealing with the executors (see the protection granted to third parties and displaced executors by section 27 of the Administration of Estates Act 1925).

The starting point for the executors where there are foreign assets is to establish, by taking appropriate local advice, the extent to which the deceased's will is recognised as formally valid in the jurisdiction where the foreign asset is.

Recognition as to whether the will is formally valid establishes the English executors' authority. However, that does not necessarily mean that the local system recognises the executor function.

If the English executors' role in relation to the foreign assets is recognised, it is then necessary to establish what that role is in that jurisdiction.

It is likely that in a common law jurisdiction English executors will need to apply for an ancillary local grant of representation or (if it is possible, as it is for example in Hong Kong or the BVI) for their English grant to be re-sealed (effectively meaning it is treated like a local grant). The Colonial Probates Act 1882 lists the countries whose grants can be re-sealed in England, ie where there are already foreign executors appointed in respect of foreign estate assets who are required to take steps in England, and other countries have similar legislation.

In civil law jurisdictions it will be necessary to establish what the local rules are in relation to the English executors' role. For example, Swiss cantons often recognise the executor function, but their rules effectively limit the function of the English executor to that of a transfer agent or conduit for the assets there (which will not have passed to the English executors).

Even where the EU succession regulation, Brussels IV, applies, and it is accepted by the local jurisdiction that the will of an English national deceased included an election that English law to apply, there is not perfect uniformity. Different notaries across the EU and even within the same EU state can take different approaches. Occasionally it is necessary to 'shop around' to find an amenable notary. English law may in theory be accepted as applying to the succession *and* administration, but it is still generally necessary to go through the local law procedures, eg requiring that beneficiaries formally accept their inheritance.

Unlike in England, beneficiaries in civil law countries can be liable for the deceased's debts when they accept the deceased's assets. So, an issue of importance for charities is the option to accept a civil law inheritance with 'the benefit of an inventory' which effectively limits their liability to the value of the inheritance they accept (as set out in an 'inventory').

In some civil law countries English executors will need the heirs to grant them a power of attorney to deal directly with assets there. Alternatively, English executors can agree with the beneficiaries and heirs to help facilitate progress and let the heirs and beneficiaries finalise matters directly with each other.

What impact do forced heirship provisions have?

Some countries have rules which mean that, irrespective of what a deceased puts in their will, children or close relatives of a deceased are entitled to a share of a deceased's estate. Forced heirship rules must be considered in the context of cross border estates, predominantly whether forced heirship is applied by the local law in that country and whether the local law applies in any event.

In some countries, such as France, the relevant part of the estate is automatically reserved for the forced heirs whereas in other countries, such as Italy and Germany, the forced heirs have a claim against the beneficiaries under the will and there is generally one year for the forced heirs to challenge the will. Where the rules offer more protection for the forced heirs, again such as in France, the limitation period can be much longer, even decades.

To make matters more complex, in civil law systems when determining entitlements, it is usual for assets gifted by the deceased while they were still living to be brought into account. Forced heirs can bring an action against the recipient of the deceased's lifetime gifts if such gifts would defeat the forced heirs' entitlements. This may impact executors in England and Wales because English courts may have jurisdiction to determine such claims.

Thought needs to be given as to whether there are any forced heirship considerations in the context of foreign assets and, if there are, how the laws of each of the countries where there are assets impacts on this. Analysis will be required as to which system of domestic law applies, what the domestic law of that jurisdiction states and how the forced heirship provisions actually work in practice.

Does English law necessarily apply?

When considering who is to inherit (succession) and how beneficiaries are to receive foreign assets after payment of liabilities (administration) the first issue is to determine which law applies. This is especially relevant where there are forced heirship considerations (discussed above). This can ultimately dictate whether English executors have a role to play in relation to the administration of foreign assets.

One must first identify the asset and locate its situs (the jurisdiction where it can be dealt with). Knowing the location of an asset is key to determining which law applies to the succession, how the beneficiaries take possession of their inheritance (administration), and the tax implications of the succession.

The situs state may apply its own inheritance law or the law of the state of the deceased's domicile, residence or nationality. Sometimes this could lead to the situs state's own laws applying anyway, which we call a renvoi (eg the law of the deceased's domicile may conclude that it is the situs state's inheritance law that applies).

The case of *Ross v Waterfield* [1929] All ER Rep 456 held that the English court is solely concerned to enquire what the courts of the situs country (for immovable assets such as foreign realty) and country of domicile (for movable assets such as foreign bank accounts) would decide.

For example, where an English domiciled individual dies with a French property, the English court would look to the succession laws of the situs country in relation to that asset, ie France. If France accepted the renvoi, French succession laws are likely to apply to the property.

As can be anticipated, there are a lot of grey areas which can cause disagreement and a lot of uncertainty. The EU succession regulation (mentioned above) sought to simplify succession processes within EU member states and ensure that there is only one law of succession applicable to an estate in those countries that adopt

the regulation. The UK is not, and never has been, subject to the Regulation but it can still affect the role of English executors where testators own assets in other Member States.

Which Will applies if there is more than one?

It is not uncommon for individuals to have one will in each jurisdiction in which they have assets. The intention may be that each will deals only with the assets in the jurisdiction in which it was made in order to make the administration 'easier' in the different jurisdictions. But, if care isn't taken, having more than one will can lead to later wills unintentionally revoking earlier ones. A foreign will could include a general revocation clause that is not limited to revoking earlier wills dealing with the property in the same jurisdiction, or the relevant part of such wills.

As was seen in the early cases of *Dempsey v Lawson* (1877) and *Re Phelan*, the courts have been prepared to look beyond a revocation clause included in a later will if there is evidence that the testator did not intend to revoke earlier wills. In determining whether the testator did intend a revocation clause to revoke a previous will, one factor that the court will consider is whether the subsequent will or testamentary instrument is complete in itself.

How the revocation clause is construed will, of course, depend on which country's rules of interpretation apply.

Where there are foreign assets, English executors will want to know about other wills that deal with those assets. If a foreign will appoints foreign executors, then there is likely to be very little for the English executors to do in respect of those assets. Of course, there may be an issue as to whether the will appointing the English executors (if a later will) revokes the foreign (earlier will) and, therefore, the appointment of the foreign executors. It will need to be determined which country's court should be the forum for such a dispute and the nature of the English executors' involvement, if any, in the proceedings.

Is an executor obliged to pay UK Inheritance Tax in respect of foreign assets?

Charities most likely won't pay any UK Inheritance Tax on UK or foreign assets left to them but there are occasions where tax is paid out of an estate before charities get their share, thus reducing the charities share.

Generally, if the deceased died domiciled or deemed domiciled in the UK then the English executors have an obligation to both report to, and pay, HMRC in respect of UK Inheritance Tax on the deceased's worldwide assets. If they were not domiciled or deemed domiciled, they only need to report and pay tax in respect of UK assets.

Issues can arise where IHT is payable on worldwide assets but the executors do not have a role in relation to the foreign assets which pass to foreign beneficiaries who do not otherwise benefit from the estate.

HMRC may seek to pursue the English executors for the tax and leave them to recover it from the overseas beneficiaries and it may be difficult to enforce the executors' right to recover the payment against those beneficiaries in the foreign courts.

Is an executor obliged to pay foreign tax or debts?

A difficult question arises for English executors when the country where foreign assets are located is one which imposes its own estate or inheritance tax on executors. Should the English executors pay the foreign tax?

The starting point (especially following Brexit) is the long-standing principle of common law that England will not enforce another nation's tax charges. It is likely to be a breach of duty to pay a tax charge which is not enforceable, even if the will empowers them to do so (*Bank of Nova Scotia Trust Co (Caribbean) v Tremblay*

(1998) 1 ITELR 673). Therefore, executors who pay the tax (and thereby reduce the distributable estate) leave themselves vulnerable to a claim by the beneficiaries who have lost out.

That being said, if there are beneficiaries in the country which is demanding the tax and the authorities will go after them for the tax in place of the executors, it may be appropriate for the executors to pay the tax despite it not being enforceable against them in England.

English executors should seek advice and, before implementing their decision, they should seek the consent of their beneficiaries or alternatively make an application to court for directions (which may be necessary where there are other beneficiaries who are not able to consent , eg minors).

A further consideration is whether the executors are entitled to double taxation/unilateral relief, ie effectively a tax credit for the tax payable on the same asset(s) in the two countries.

English executors should adopt the same caution in relation to the payment of foreign debts in case they too are not enforceable in England. Where the enforceability depends on the foreign court's jurisdiction over the executors, they should bear in mind that the steps they may be taking in the other country in respect of the foreign assets could constitute submission to the foreign court's jurisdiction. Of course, the foreign creditor may be able to enforce the debt against the assets in their jurisdiction in any event.

Top tips

1. English executors may be obliged to collect in and administer foreign assets and may be obliged to report to HMRC and pay tax in respect of foreign assets.

2. Executors ought to take advice from an appropriate adviser and, if necessary, a local lawyer/notary in relation to the succession/administration of foreign assets.

3. Your charity ought to expect a well-advised executor to seek its consent for a proposed course of action in relation to foreign assets, or to be made party to a court application (eg where there are minor beneficiaries who are not able to consent).

4. Your charity may be able to challenge the treatment of costs incurred as 'estate expenses' if it has not approved the steps taken in relation to foreign assets.

5. English executors should not pay foreign tax or debts without first establishing that the liability could be enforced against them in England.

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Getting to the finishing line

Indemnities, insurance and lessons learnt

What do you do if the executors say they want to take out an insurance *before* they distribute? Specifically, if they say they need insurance because of the 'risk' that a later Will was executed that they don't know about?

Where there is no evidence of a challenge then statute protects the executor who distributes in good faith. There is an alternative Court route but that is also expensive. Indemnities provide the answer.

But insurance has to be justified!

What is the scenario?

I am dealing with an estate where the executors have taken out an insurance policy against this 'risk' for 1.4% of the total value of the estate just under two million pounds.

They have proved a Will over 18 months years ago in the estate of someone who died over two years ago – but that Will is over 20 years old. They placed Trustee Act notices and have done a Certainty search. There is nothing in the testator's papers indicating a later Will. But they just don't know the deceased did not make a later Will.

The executors' envisaged nightmare is that they will have distributed the estate only to find out at some future date that the Will they propounded was not in fact the testator's last Will. Instead, it transpires there was a later Will and, whether or not they were still the named executors, that later Will left the estate to different beneficiaries who will be upset to have been denied their inheritance.

The executors say they don't want to face liability. Why might they? Because it will transpire, they have paid the estate out to the wrong person(s) and in doing so, however innocently, have committed an act of devastavit and consequently face a claim for the funds that they have distributed in accordance with the original Will.

You want the estate distributed. But you don't want the estate to incur (i) the cost of the insurance premium or (ii) the cost of time spent exploring insurance premiums / agreeing terms etc.

What are your options?

Economics and the wider sector

The premium of 1.4% in the estate mentioned above equates to around £28,000. In the context of a £1.9m estate, may not feel significant (although the more legacies there are the greater the proportion of the residuary funds going to charity diverted towards the insurance premium).

Legacy Foresight's report to April 2023 recorded annual legacy income as being four billion pounds.

Let's assume insurance against the fanciful becomes the vogue, 1.4% of four billion equals £56 million.

Statute

How do you deal with the executors' anxiety? In the scenario described above there is no reason to be legitimate reason to be anxious.

S27 Administration of Estates Act 1925 states:

27 - Protection of persons acting on probate or administration.
(1) Every person making or permitting to be made any payment or disposition in good faith under a representation shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation.

(2) Where a representation is revoked, all payments and dispositions made in good faith to a personal representative under the representation before the revocation thereof are a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made.

In other words, no claim can lie against a personal representative who distributed in good faith under what appears to be a valid grant.

Going to Court

The court has jurisdiction to remove roadblocks and order that the person who initially alleged the claim must start court proceedings within a certain (and relatively short) time period and, if they do not, then the executor will be permitted to distribute the estate free of the risk of any personal liability to the potential claimant.

The way the Courts have approached this issue has developed reasonably recently starting with ***Sherman v Fitzhugh Gates*** **[2003].**

Brother and sister Len and Emma had lived in a house in Brighton for many years. They were both in their 90s when they died. Neither married or had children.

When Emma died, she left her estate to Len. Everything was then, under Len's Will, meant to go to their great-niece and great-nephews.

Len had a change of heart and, apart from minor gifts, left almost his entire estate to charity.

A great niece, who lived in Canada, alleged that Len had lacked capacity to execute this new Will.

She changed her legal representation a number of times and her lawyers made allegations without clearly setting out her claim.

The executors told her that it was for her to bring proceedings if she was going to contest the will. She did not, so the executor began proceedings to determine whether she had an interest in the estate.

The course of proceedings was longwinded but eventually reached the Court of Appeal. There, Lord Justice Carnwath said '*I see no reason why [the powers of the court] could not have been used to impose a time-limit on a potential challenge to the probate — in effect a direction to 'put up or shut up' — following which the executor would be free to distribute under the will*.'

In other words, we see the Court of Appeal considering the possibility of making a 'put up or shut up' order to prevent vexatious individuals threatening to challenge a will on tenuous grounds without ever advancing a formal claim.

The next case was ***Cobden-Ramsay v Sutton*** **[2009].**

Mrs Sutton had executed a will dividing residue between her two adult children: Julian Sutton and Lady Bristol.

Mrs Sutton later executed a codicil increasing the share of the estate going to Lady Bristol – the effect being that Julian lost out on £60,000.

Not unsurprisingly, Julian was unhappy and asserted in correspondence, between April and October 2007, that his mother had lacked capacity to execute the codicil. He then went quiet, writing again only once in February 2008. The executor provided evidence that Mrs Sutton had capacity.

Julian refused to bring any proceedings and this held up distribution from the estate as the executor was unsure he would have the protection of s27 Administration of Estates Act 1925.

The executor applied for an order permitting him to distribute unless Julian issued proceedings within 28 days.

The court decided in August 2008 that this was '*pre-eminently a case in which [a put or shut up order] should be made*'. The judge highlighted that the executor had made available all material believed to be relevant on capacity, but Julian still refused to bring proceedings.

The judge said that a 'put up or shut up' order was not too draconian on Julian because he was not debarred from bringing a claim against the recipient (his sister) under the codicil if it was later ruled invalid: he was only prevented from later bringing proceedings against the personal representative.

That is important because, by a 'put up or shut up' order, the court is authorising the executors to distribute – it is not preventing the other party from bringing claims, including against the recipients of estate assets.

The third case which helps illustrate the Court's approach is ***Thomas v Thomas* [2021].**

Mrs Thomas had died in 2018, survived by three sons: the claimant, the first defendant and the third defendant.

Probate was granted to the claimant.

There was a question over the interpretation of the will – but the claimant sought an order allowing him to distribute the estate in accordance with its terms.

The third defendant disagreed and somewhat vaguely alleged that Mrs Thomas had been mentally ill and that the will was invalid for other unspecified reasons.

A claim was issued to interpret the will and authorise distribution.

At the hearing, the judge noted that no substantial basis had yet been shown supporting that Mrs Thomas lacked testamentary capacity or that her will was invalid for any other reason.

On that basis the third defendant was given 28 days to issue a claim or the estate should be distributed per the will.

In summary, the Court can and will step in if the estate administration is being held up if the step is not draconian, but the court will want to be comfortable in doing so as it does, effectively, stop someone making a challenge in the future. For example, the Court will expect disclosure of documents which support the will being valid.

The claim should be vague, unparticularised or unspecified for the court to make a 'put up or shut up' order (although if there is a genuine claim then executors are unlikely to want to distribute in any event).

A 'put up or shut up' is not a silver bullet for beneficiaries as it only protects the executor from potential future claims. It does not prevent a potential future claim against beneficiaries who have received sums which it transpires they should not.

From a beneficiary's perspective, suggesting that an executor apply for a 'put up or shut up' is almost certainly attractive to get the estate administered. Even if it is thought that a claim really might be brought down the line the longer the disgruntled beneficiary leaves it the less credible the claim is likely to be seen.

What is good faith?

Unhelpfully the Courts have tended to insist that it depends on context.

'Shorn of context, the words "in good faith" have a core meaning of honesty. Introduce context, and it calls for further elaboration. Thus in the context of a claim or representation, the sole issue as to honesty may just turn on its truth. But even where the content of the statement is true or reasonably believed by its maker to be true, an issue of honesty may still creep in according to whether it made with sincerity of intention for which the Act provides protection or for an ulterior and, say, malicious, purpose. The term is to be found in many statutory and common-law contexts, and because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another.'

Street v. Derbyshire Unemployed Workers' Centre [2004] EWCA Civ 964 (Auld LJ at [41])

A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse.'

Hayes v Willoughby [2013] UKSC 17 (Lord Sumption at [14])

Importantly in *Cobden-Ramsay* it was acknowledged that there might be a question as to whether section 27 protection was available because the executor knew that Julian was unhappy. There Julian had at least actively intimated a challenge.

Does worrying that there is a later Will mean any distributions are not made in good faith?

There is no real logic to expressing concern that there may be a later Will just because the Will is twenty or thirty years old. If the test is *certainty* that a later Will was not executed there will be very few circumstances in which an executor can have no doubt that there is no later Will. It is not unknown for a testator to make a Will only to change it the following day.

It is true that the older the Will by definition the more opportunity the testator had to make a new Will. But if age of the Will is the only factor how old does the Will have to be before distributions are not 'in good faith'?

There must be something concrete to justify executor concerns because otherwise s27 becomes meaningless – and Parliament will not have intended legislation that has not meaning.

Indemnities as an alternative

Ideally, the executor would not issue a Court application with the associated cost, delay and even potential PR risk.

Firstly, we say that the Executors have statutory protection under section 27 of the Administration of Estates Act 1925. Under this, as long as the executors are acting in 'good faith', they are entitled to (and should) get on and distribute the estate in accordance with the Will which they believe – and have sworn on an oath – to be the last valid will.

So in the unlikely situation that the Will is successfully challenged in the future, and the grant of probate overturned, the executors can rely on the protection in the statute.

But, for some executors, this explanation doesn't give them the reassurance they want where there has been an earlier suggestion that the Will is invalid. To benefit from the s27 protection, the executor must be acting in 'good faith'. The executor may question whether they will be seen to have acted in 'good faith' in distributing when they knew about a potential claim.

Executors are often enthused about getting insurance. But insurance is usually costly to put in place, both in terms of premium but also the time taken to organise. And it usually only protects the executors (ie it doesn't stop a claim against the original beneficiaries).

If that is their mindset, you will very likely want to encourage them towards an indemnity.

How long is the risk?

There is no time limit applicable to a challenge to probate. Which adds to executor concerns that they are potentially on the hook forever.

But the claim they face is a claim for wrongful distribution – devastavit.

Under s22 of the Limitation Act 1980, there is a statutory limitation period of 12 years for an act of devastavit. The statute says that the 12 years begins to run 'from the date on which the right to receive the share or interest accrued'. This is usually deemed to be a year after the death – taking us to 13 years in total.

If there have been delays, the executors might be nervous about when the time for any claim starts to run. In these circumstances, there may be an argument that the 12 years starts to run from the date of distribution.

There is nothing in s22 Limitation Act which suggests that it is only limited to validly appointed personal representatives. So it seems that if the executor had a grant of probate, but that grant later turns out to be based on an invalid will, the statutory limitation periods still apply, even though the executor is no longer a 'valid' personal representative.

If there is a validity challenge in the future the executors should be neutral and so will not (or at least should not!) incur any legal costs.

Conclusion

Charities need to be alive to the risk of estate funds being wasted on unnecessary insurance policies and be ready to step in promptly as soon as they get an indication that executors are minded to go down that route.

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Stephen is a partner in the trust and succession disputes team.

He advises a range of clients (private individuals, beneficiaries, trustees, executors, deputies, attorneys and charities) in relation to trust, succession / inheritance and Court of Protection disputes, often involving international and cross-border issues.

Since day 1 at Withers, now over 17 years ago, Stephen has been advising charities. He regularly advises them on defending and challenges to the validity of wills, issues of construction and rectification of wills and deeds, constructive trust and proprietary estoppel claims, claims under the Inheritance (Provision for Family and Dependants) Act 1975, and professional negligence claims involving estate planning, trust and succession issues

He has particular expertise in proceedings before the Court of Protection, where he frequently acts for both applicants and respondents in applications for statutory wills, lifetime gifts, contested registrations of powers of attorney, deputyships and health and welfare decisions. Stephen regularly advises in relation to investigations by the Office of the Public Guardian.

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Alice is a senior associate in the trust and succession disputes team.

She acts for charities, private individuals and institutions in relation to all aspects of contentious trust and succession disputes, with a particular focus on Court of Protection matters.

She advises on a range of issues that come within the Court of Protection's jurisdiction, including statutory will applications, lifetime gifts and matters concerning the operation of attorneyships and deputyships. She is an active member of the elder law team.

She also advises on all aspects of the validity of wills, including claims of undue influence to disputed capacity, and actions brought under the Inheritance (Provision for Family and Dependants) Act 1975, and issues of construction and rectification.

Alice is recommended by Legal 500 in the area of Private Client and Court of Protection.

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Sarah is a partner and head of the UK art team.

Sarah is deeply immersed in the art industry, having worked for almost twenty years with artists and their estates, galleries, agents and dealers, collectors, foundations, trustees, auction houses, art lenders, fractional ownership platforms, and other industry players such as art businesses within the technology sector. Sarah advises on the various aspects of the complex and often idiosyncratic relationships in the sector (both from a contentious and non-contentious perspective), and acts as trusted adviser to many of her clients.

Sarah advises on high value transactions for the sale and purchase of fine art and other valuable moveable assets (such as musical instruments, antiques, and precious stones). She also drafts the contracts underpinning the commercial relationships within the sector (such as consignment agreements, agency agreements, representation agreements, terms of sale, loan agreements, and auction house terms). Sarah has a particular specialism in the anti-money laundering regulation of the art market.

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Kenny is a partner in the intellectual property and technology team.

He advises on IP, licensing, commercial technology and data protection. Kenneth regularly assists charities and not for profit organisations.

He has extensive experience in these specialised areas advising clients across a range of sectors including luxury brands, fashion, sport and entertainment, digital media, software and technology, art and design, hotels and leisure, music, publishing, financial services, retail and manufacturing. As well as dealing with soft and hard IP issues, Kenneth's regulatory expertise includes, data protection, cyber security, UK and EU competition law, freedom of information, e-commerce, consumer law and financial services outsourcing.

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Rosalind is an associate in the trust and succession disputes team.

She acts for private individuals, charities and trustees across a range of inheritance and trust matters, including the validity and construction of wills, contentious estate administration, removal of executors and trustees, and the Inheritance (Provision for Family and Dependants) Act 1975. She is also a member of the Charity Legacy team.

Rosalind trained at the firm, where she also spent time with the Private Client, Corporate and Family practices. She assisted a variety of domestic and international clients and developed a thorough groundwork in trust, tax and succession planning, corporate governance, and high net-worth divorce and financial disputes.

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Stephen leads the global fraud team.

His practice focusses on international asset freezing and recovery cases, heavyweight commercial litigation and regulatory disputes and Stephen is particularly adept at drawing on the firm's tax expertise in such cases to obtain a strategic advantage. More recently, his practice has also developed to encompass tackling fraud involving digital finance, digital assets and cryptocurrency.

Stephen also often acts for family offices, successful families, entrepreneurs and their businesses on a broad range of commercial disputes and heads up our family office first group, which is an innovative approach to finding positive solutions for family conflicts.

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Hugo is a senior associate in the charities team.

He advises a wide range of charities, not-for-profits and individuals with philanthropic aims on charity law and commercial matters, including the establishment of organisations, governance, compliance and general operation.

Hugo regularly advises charities in relation to their governance frameworks, and in particular on adopting and refining schemes of delegation. He also advises charities in relation to regulatory interaction, including responding to queries from the Charity Commission or obtaining authority from the Commission to undertake necessary actions.

Hugo has assisted with the successful registration with the Charity Commission of multiple charities, including US/UK dual qualified charities. He has particular experience with supporting the establishment of charities working with or otherwise connected in some way to non-charities, as well as NHS charities.

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Sarah is a senior associate in the trust and succession disputes team.

She advises on all types of domestic and international probate disputes including issues relating to the validity of wills and trusts and claims under the Inheritance (Provision for Family and Dependants) Act 1975.

She also specialises in on and offshore trust litigation including claims for removal of protectors or trustees, access to trust information, Mistake, Variation and directions applications. She has experience on cases in jurisdictions including the Jersey, Guernsey, Switzerland, Bermuda, BVI, Cayman, the Isle of Man and Nevis.

Together with other members of the team Sarah also advises on professional negligence actions in the context of trusts and estates.

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Natasha is a partner in the trust and succession disputes team.

She advises on a wide range of trust and succession disputes both onshore and offshore, including trustee/beneficiary disputes, contested probate and 1975 Act claims, and professional negligence in the context of estate planning and trust administration.

She also advises on Court of Protection matters, including statutory wills, lifetime gifts and contested registrations of Powers of Attorney.

She is described as 'an outstanding lawyer', 'unflappable and has good technical knowledge'. 'She is approachable, she makes time for clients and she has a really sensible head on her shoulders'.

Natasha has contributed to the past two editions of The Law Society's Probate Practitioner's Handbook and the most recent edition of Jordan's International Trust and Divorce Litigation.

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Jaime is a partner in the private client and tax team.

She advises on US and international tax and estate planning, particularly for families and trusts with US/UK cross-border concerns.

Jaime devotes a large part of her practice to advising individuals and families in relation to their philanthropic goals and charitable structuring for both individuals and non-profit organisations. She has extensive experience with the establishment and operation of US charitable vehicles, including those that form part of dual qualified charitable structures, which attract tax-efficient contributions from US persons outside the US. She also advises non-US charities in relation to US investments and fundraising.

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Richard is a senior associate in the trust and succession disputes team.

He advises on domestic and international disputes (or on how to minimise the risk of disputes) relating to trusts, wills, probate and inheritance, gifts for charities, shared ownership of property, informal promises of property, professional and non-professional fiduciary services (including individual and corporate trustees, executors, attorneys and deputies), the property and financial affairs of vulnerable adults and charitable status.

Richard regularly assists charities involved in legacy disputes and has advised on the impact of orders of the Charity Commission. One reported success involved appealing a court order made several years earlier in order to significantly enhance a charitable legacy (*British Red Cross v Werry*).

Richard also teaches the law of trusts (including aspects of charity law) at University College London and has previously taught at King's College London and the School of Oriental and African Studies.

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Elizabeth is an associate in the private client and tax team.

Her practice primarily focuses on advising executors, administrators and charity beneficiaries in relation to estate administrations. This involves complex post-death inheritance tax reporting for UK and non-UK domiciled individuals, obtaining authority from the court to deal with assets in the form of a Grant and post death administration and variations.

She also works closely with the trust and succession disputes team, advising in relation to the non-contentious elements of will disputes.

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Paul is a partner in the trust and succession disputes team.

He heads the firm's work for charities and not-for-profit organisations on legacy income with Stephen Richards.

Top ranked in the legal directories, he is described as a '*star litigator*' and '*a formidable opponent*'.

Paul specialises in all types of trust and probate disputes. A barrister interviewed by the leading independent legal directories commented: '*if I were a client with a contentious trusts or probate claim, I would, without hesitation, go to Paul*'.

Paul also advises on contentious Court of Protection matters, both financial, and health and welfare, and on professional negligence claims arising out of trust and estate administration, and failed estate and tax planning.