

# Probate: The Next Generation

## Avoiding claims against the solicitor

In the last in her series, **Araba Taylor** looks at how private client solicitors can prevent claims against both themselves and the estate

**W**ith contentious probate claims on the rise, private client solicitors need to be aware, both pre- and post-death, of ways in which claims can be prevented. It is bad enough to be called as a witness in a case, with the attendant risk of being criticised by the judge (see *Re Morris (Deceased)* [2001] as an example), but far worse to be the defendant.

The relationship between the solicitor and the client does not necessarily give rights to any third party, but this may not prevent them from suing after the death, if they consider they have been adversely affected by some default in the performance of that retainer. On the one hand, there are decisions such as *Clarke v Bruce Lance* [1988], where the solicitors were held not to owe any duty to the disappointed beneficiary (albeit the complaint did not arise out of the will-drafting retainer), and on the other, decisions like *Humblestone v Martin Tolhurst Partnership* [2004], where a solicitor was held to owe duties to a beneficiary even in relation to a will execution retainer.

The CA decision of *Daniels v Thompson* [2004] shows that even where the private client solicitor has been at fault, the next generation cannot be certain of recovering damages. Here, the deceased's solicitor had advised her that she could avoid inheritance tax on her death by giving her house to her son and continuing to live there. Such advice was clearly incorrect, having regard to the reservation of benefit rules. Accordingly, when she died, the charge to IHT was increased by the value of the house, which continued to be treated as part of her estate for inheritance tax purposes. A claim was brought against the solicitor, by the testatrix's son, in his capacity as executor, for negligence. Limitation was tried as a preliminary issue: namely to determine when the testatrix suffered loss. The first instance judge held that if there was a cause of action in respect of the incorrect advice, in contract/tort, it arose when the advice was given, such that the claim was barred by the Limitation Act 1980. The executor appealed. The Court of Appeal refused the appeal on the grounds that the deceased herself (represented by her son as her executor) had not suffered any loss from the solicitor's alleged negligence because she could never be obliged to pay inheritance tax. The burden of paying

inheritance tax fell on the deceased's estate, and was, therefore, a loss to be borne by the beneficiaries of that estate. The CA considered that the testatrix had never had a cause of action and the preliminary limitation issues proceeded on a false hypothesis. Her only real loss was the inability to take other, effective, estate planning steps, such as making a PET of her home and the person who had suffered as a result of this was a beneficiary, not the client herself.

### **No realistic prospect of success**

There was also an application to amend the claim to allow the executor to plead that the duty had been owed to him as PR, since it is the PRs who are primarily liable for the payment of IHT. Although permission to amend was refused, it is of interest that the CA did not consider that such a claim would have had a realistic prospect of success, principally because the tax is payable as part of the general testamentary and administration expenses of the estate and not by the PRs themselves.

The CA also held for the solicitor in *Atkins v Dunn and Baker* [2004], this time on the basis that there was no fault. In this case, the deceased had remarried and had therefore caused his prior (valid) will to be revoked. He then instructed a firm of solicitors to prepare a new will and a draft was duly sent to him. Following this, there was no specific communication between the deceased and the solicitors relating to the will and the deceased died intestate. The beneficiary named in the draft will then brought an action in negligence against the solicitors. The CA held that, on the facts, the solicitor who prepared the draft will was not negligent in failing to send out reminders to the client. The solicitor had carried out his instructions and there was no evidence that the deceased would have acted on a reminder if it had been sent out.

Another fertile source of post-death litigation is the rectification claim. This can easily arise nowadays out of word-processing errors, while omissions, misunderstandings and the use of inappropriate expressions are also common. Even where the mistake and the solution to it are obvious, the solicitor or his insurers are likely to be under-writing the proceedings needed to correct the mistake. And where the six-month time limit for rectification claims has expired, there is quite likely to be a negligence

claim by those adversely affected, if the mistake in the will can be shown to be attributable to the draftsman.

### Notice of severance

Another risk area can arise where the solicitor fails to investigate the testator's circumstances fully before allowing him to make a will. Typically, this can be the failure to ascertain that assets are jointly owned and that a notice of severance requires to be served. Often, however, claims arise where someone to whom the client owes some sort of obligation receives nothing under the will or provision which could be considered insufficient. This may be, for example, an occupier or carer, who has been promised a roof over their head, or a dependant or relative who, if not provided for, may be entitled to make a claim under the 1975 Act. In the former case, the solicitor may well be unaware of the promise or informal arrangement which has been made by the client and the client may well want to conceal it. In 1975 Act cases, however, the solicitor will be aware of all the categories of potential claimant, since these are laid down by section 1(1) of the Act.

It is extremely unlikely that, in a constructive trust/proprietary estoppel case, the solicitor would be held to have been negligent for failing to ensure that such a person received something under the will, even though one limb of the *Banks v Goodfellow* test for capacity is an awareness of those persons with a claim on the testator's bounty. However, it would be prudent to attempt to identify all such persons, to encourage the testator to make provision for them and to warn him of the consequences of failing to do so.

### Avoiding hostile claims against the estate

Claims to property comprised in the estate on the basis of constructive trust and proprietary estoppel will be made against the personal representatives, who now stand in the deceased's shoes. If the claim is successful, the property will be held by them for the claimant on whatever terms are appropriate and will not form part of the estate. Success will be on the basis of some form of unconscionable conduct on the part of the deceased and no form of blame is likely to attach to the solicitor, even if he is also the executor.

On the other hand, in respect of a bitterly-contested claim, where the beneficiaries want the claim to be resisted, or where the solicitor-executor himself is in possession of information which suggests that it is unmeritorious, it may be impossible for the solicitor to remain neutral. Although the case will be handled by litigators, with the private client solicitor acting merely as client, complex issues may arise, for example in relation to disclosure of papers still covered

by legal professional privilege and other evidence and attendance at the trial may not always be avoidable.

There are no obvious ways of preventing such claims, since a testator must remain free to disinherit persons for whom he ought to provide or to leave property which appears to be his to someone other than the true beneficial owner. The solicitor should, however, make inquiries when taking instructions — particularly where it is known that such a potential claimant exists — and appropriate warnings can be given.

This is obviously much more straightforward in 1975 Act claims, where the categories of potential claimant are laid down by statute. In such cases, it is not uncommon for clients to make a statement, in the will or outside it, explaining why they are not making provision. This will not bind the court hearing any application, but will be persuasive. The position is more difficult in proprietary estoppel or constructive trust claims, although it may be possible to elicit whether, for example, the client has had financial assistance, typically from the next generation, in purchasing a right to buy a home, which might reasonably be expected to have given the children proprietary rights.

**Another method is an *in terrorem* clause, threatening any beneficiary who challenges the will with losing their inheritance.**

### Using the will to prevent claims

It is not uncommon for testators to make a statement explaining why they are not making provision for a particular beneficiary. Where this is on the basis that adequate lifetime provision has been made, and, better still, where this is true or amounts to a reasonable belief, it may be sufficient to prevent a claim. This is particularly true of potential 1975 Act applicants falling outside the category of spouse or registered civil partner and who, accordingly, are only eligible for provision on the maintenance standard.

Another method is an *in terrorem* clause, threatening any beneficiary who challenges the will with losing their inheritance. There is no public policy objection to these clauses, but the court may resist upholding them on the grounds that they are too vague to be enforceable.

Claims contesting the validity of wills, relating mainly to the elderly or mentally impaired testators, have always been (and, in view of the above statistics are likely to remain) an increasingly substantial source of litigation between family members, beneficiaries and executors. But it should be possible to minimise the risk in cases where the deceased has consulted a solicitor, by the adoption of best practice.

**Araba Taylor is a Chancery litigator, practising from chambers at 9 Stone Buildings, Lincoln's Inn and St Albans Chambers. She specialises in litigation arising out of property, trusts and wills, with a particular emphasis on elderly client cases.**