



#5sblaw

5 Stone Buildings

Trusts and Inheritance: Recent Developments

28 November 2017

at

The Royal Society of Arts

8 John Adam Street

London WC2N 6EZ

www.5sblaw.com

2.5 hours

- 8.30 am **Registration and breakfast**
- 9.10 am **Introduction – Penelope Reed QC**
- 9.20 am **Trust Disclosure and Data Protection**

Mark Baxter
- 9.50 am **Retrospective remedies for tax problems: rectification,
construction and mistake - where are we now?**

Henry Legge QC
- 10.20 am **Refreshments**
- 10.50 am **Avoiding probate disputes using statutory wills and an
inheritance case update**

William East
- 11.20 am **The Law Commission Wills Consultation**

Barbara Rich
- 11.50 am **Panel discussion and Q&A**
- 12.30 pm **Close**

Penelope Reed QC has a wide Chancery practice with special emphasis on trusts, wills, contentious probate, family provision claims and tax, both in the UK and overseas. She acted for the successful charities in their appeal to the Supreme Court in *Ilott v Mitson* [2017] UKSC 17. Penelope is recommended by all the leading directories, is described as *“faultless. Her advice is delivered succinctly and without hesitation, inspiring the greatest of confidence in both her instructing solicitors and her clients.”* She is praised for her mastery of contentious probate, trusts and capital tax matters. She is an accredited mediator, a member of STEP, ACTAPS and until recently was the chair of the Chancery Bar Association. She lectures and publishes widely on all areas of her expertise.

Mark Baxter has a broad traditional chancery practice including a particular focus on contentious and non-contentious trusts and probate, tax, and Court of Protection work, and related professional negligence. He is recommended in two areas of practice in Chambers UK 2017, described as *“technically superb, is very good with clients, and is a very persuasive advocate who provides a tremendous service”*. Mark regularly lectures and contributes to professional journals on all areas of his practice and is co-author (with Penelope Reed) of *Risk and Negligence in Wills, Estates, and Trusts*. Mark recently appeared at first instance and on appeal in *Randall v Randall* [2014] EWHC 3134 (Ch), [2016] EWCA Civ 494, which is the leading case on standing to bring a contentious probate claim, as well as in *Roberts v Fresco* [2017] EWHC 283 (Ch), where he successfully resisted an attempt to bring an Inheritance Act claim by a deceased claimant’s estate.

Henry Legge QC’s practice includes a broad range of chancery work but with particular emphasis on cases involving trusts, estates, pension schemes and disputes relating to personal chattels and art. Throughout his career he has acted regularly in trust, estates and probate cases. Notable recent cases include the *Longleat* litigation, the *Trilogy* litigation and *Gorbunova v Berezovsky*. *“One of the brightest stars of the chancery Bar. A brilliant advocate with great technical nous. Fantastically bright.” Chambers HNW 2016*

William East has a general chancery practice in all areas of work undertaken at 5 Stone Buildings. For nine months after completing pupillage he was a judicial assistant in the Supreme Court to Lords Walker and Dyson. He makes regular appearances in the High Court, County Court and the Court of Protection and is listed for the latter as a leading junior in Chambers UK 2017. In the 2016 directory he was praised for *“his financial and investment expertise alongside his family estate planning experience.”* He is a member of the Bar Pro Bono Unit and also participates in the CLIPS scheme in the High Court giving free representation to litigants in person in the Chancery Division Applications Court. He has written for several professional publications and frequently lectures on areas of his practice.

Barbara Rich specialises in contentious succession and trusts litigation, and in the property and affairs jurisdiction of the Court of Protection under the Mental Capacity Act

2005. The cases she deals with are often of substantial value and/or legal complexity and importance. Barbara is also an enthusiastic, effective and experienced mediator. She is recommended in the Legal 500 2018 directory as a tier 2 leading junior for Private Client: trusts and probate work: *'Her stamina is huge and her brain power second to none'*, and as a tier 1 leading junior for Court of Protection work, and in Chambers UK Bar Guide 2018 as a leading junior in traditional Chancery work: *"Handles clients extraordinarily well. She also has a good academic grasp of the law whilst at the same time being a strong litigator who can identify and make practical arguments"* and as a star individual in Court of Protection property and affairs work.

These notes are intended as an aid to stimulate debate: delegates must take expert advice before taking or refraining from any action on the basis of these notes and the speaker can accept no responsibility or liability for any action or omission taken by delegates based on the information in these notes or the lectures.

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Trust Disclosure and Data Protection

Mark Baxter

**Trust and Inheritance:
Recent Developments**

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Trust Disclosure & Data Protection

Mark Baxter

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Trust Disclosure & Data Protection

Discretions & deliberations

The office of trustee “*if faithfully discharged, [is] attended with no small degree of trouble and anxiety*”

(Knight v Earl of Plymouth (1747))

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Trust and Inheritance:
Recent Developments

<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <p>Discretions & deliberations</p> <ul style="list-style-type: none">• Discretionary trusts give trustees difficult decisions :<ul style="list-style-type: none">- 'Flexibility' means leaving trustees to decide who gets what.- Testator has no duties; trustees have many• Even if not DT as generally meant, trustees will often have discretionary powers, e.g. power to assent or appropriate• Beneficiaries will often seek explanations from trustees as to why their claims have not been satisfied when others have been <p>www.gsblaw.co.uk 3</p>	<hr/>
<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <p>Discretions & deliberations</p> <ul style="list-style-type: none">• What are trustees' duties to<ul style="list-style-type: none">- Consult with beneficiaries?- Provide information to beneficiaries about trust?• Also separate question of whether data protection laws require trustees to provide beneficiaries with info they hold about them <p>www.gsblaw.co.uk 4</p>	<hr/>

Trust and Inheritance: Recent Developments

<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <h3>Acting on results of consultation</h3> <ul style="list-style-type: none">• No duty to follow views expressed, even of majority• If did tend to follow views of majority, would offend against principle of non-delegation: minority could challenge• <i>Re Steed's WT</i> [1960] Ch 407<ul style="list-style-type: none">- Protective trust for B, and B had exercised power of appointment of reversion in his own interest, i.e. "overwhelmingly preponderant interest in the trust property"- But trustees not bound to comply with wish not to sell, and no ground for suggesting had done anything wrong in selling <p>www.gsblaw.co.uk 7</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <h3>Disclosure of info by trustees</h3> <ul style="list-style-type: none">• Different principles apply depending on<ul style="list-style-type: none">- Who is asking<ul style="list-style-type: none">o Beneficiaries with more direct interest entitled to more info than those with more remote interests- What information is being sought<ul style="list-style-type: none">o Request for info about existence of trust less controversial than request for info about way in which trustees have exercised their discretion• No statutory rules (unless in course of litigation, in which case governed by CPR Part 31) <p>www.gsblaw.co.uk 8</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

**Trust and Inheritance:
Recent Developments**

<p>5 Stone Buildings</p> <p style="text-align: right;">28 November 2017 Trust Disclosure & Data Protection</p> <p>Disclosure of info by trustees</p> <ul style="list-style-type: none"> • Info about existence of trust <ul style="list-style-type: none"> - <i>Hawkesley v May</i> [1956] 1 QB 304 <ul style="list-style-type: none"> o Lifetime settlement: duty to inform B with IIP of interest o Will trust: no duty, because Will public doc, whereas trust deed private <p style="text-align: right;">www.gsblaw.co.uk 9</p>	<hr/>
<p>5 Stone Buildings</p> <p style="text-align: right;">28 November 2017 Trust Disclosure & Data Protection</p> <p>Disclosure of info by trustees</p> <ul style="list-style-type: none"> • Accounts and trust documents <ul style="list-style-type: none"> - Orthodox view <ul style="list-style-type: none"> o Trustees have duty to be constantly ready with accounts o Right of B to inspect trust docs founded in proprietary interest: property of trust, and so beneficially owned by Bs - <i>Schmidt v Rosewood</i> [2003] UKPC 26 <ul style="list-style-type: none"> o No proprietary right, but Bs can ask court to compel disclosure as part of inherent jurisdiction to supervise execution of trusts o All Bs have right to ask, but not all entitled to receive <p style="text-align: right;">www.gsblaw.co.uk 10</p>	<hr/>

Trust and Inheritance:
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<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <h3>Disclosure of info by trustees</h3> <ul style="list-style-type: none">- <i>Schmidt v Rosewood</i> [2003] UKPC 26<ul style="list-style-type: none">o No reason to draw clear distinction between rights of different classes of beneficiarieso But may be necessary to balance competing interests of different classes: may be no difficulty in concluding B with no more than theoretical possibility of benefit should not be granted relief- Accounts<ul style="list-style-type: none">o No absolute right, but in ordinary case no doubt discretion should be exercised to disclose to B on demand: to refuse would be in direct conflict with trustees' fundamental obligation to be accountable to beneficiaries <p>www.gsblaw.co.uk 11</p>	<hr/>
<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <h3>Disclosure of info by trustees</h3> <ul style="list-style-type: none">• Trust instrument and related documents<ul style="list-style-type: none">- Sets out extent and basis of beneficiary's interest, so difficult to see circumstances in which should not be allowed to see it (at least redacted in respect of other Bs)<ul style="list-style-type: none">• So deed exercising power of appointment in favour of B should be disclosed• But deed exercising power of appointment in favour of other Bs should not be <p>www.gsblaw.co.uk 12</p>	<hr/>

**Trust and Inheritance:
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<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <p>Disclosure of info by trustees</p> <ul style="list-style-type: none">• Letters of wishes<ul style="list-style-type: none">- Trustees entitled (probably required) to take into account in exercising discretions- Disclosure could expose reasons for trustees' decisions- Also arguably confidential between settlor and trustees- <i>Breakspear v Ackland</i> [2009] Ch 32<ul style="list-style-type: none">o In interests of B of family DTs, and advantageous to due admin of such trusts, that exercise by trustees of dispositive discretions is entirely confidential <p>www.gsblaw.co.uk 13</p>	<hr/>
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Trust and Inheritance: Recent Developments

<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <h3>Disclosure of info by trustees</h3> <ul style="list-style-type: none">Trustees' reasons<ul style="list-style-type: none"><i>Re Londonderry's Settlement</i> [1965] Ch 918: no general duty to disclose reasons for discretionary decisionsExtends to docs<ul style="list-style-type: none">Setting out trustees' deliberationsRecording trustees' reasonsShowing material upon which trustees' decisions were or might have been based<ul style="list-style-type: none">NB Merely falling within this category does not justify withholding, e.g. trust accounts <p>www.gsblaw.co.uk 14</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <h3>Disclosure of info by trustees</h3> <ul style="list-style-type: none">Extending or restricting beneficiaries' rights in trust deed<ul style="list-style-type: none">Settlor can require trustees to give disclosure to particular (or all) beneficiaries of particular (or all) documents/infoMay be more difficult for Settlor to restrict because risks stripping trust of essential features<ul style="list-style-type: none"><i>Armitage v Nurse</i> [1998] Ch 241<ul style="list-style-type: none">"there is an irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts" <p>www.gsblaw.co.uk 15</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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Trust and Inheritance: Recent Developments

<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <h3>Data Protection Act 1998</h3> <ul style="list-style-type: none">• <i>"Data"</i>: information recorded as part of a relevant filing system (structured set of information)• <i>"Personal data"</i>: data relating to living person from which can be identified<ul style="list-style-type: none">– Includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.• <i>"Subject"</i>: person who is subject of personal data• <i>"Data controller"</i>: person who determines purposes for which and manner in which personal data processed• <i>"Processing"</i>: obtaining, recording, or holding data <p>www.gsblaw.co.uk 16</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <h3>Data Protection Act 1998</h3> <ul style="list-style-type: none">• "Data controllers" would include UK-based:<ul style="list-style-type: none">– Trustees;– Solicitors to Trustees.• "Subjects" would include:<ul style="list-style-type: none">– Beneficiaries;– Settlor. <p>www.gsblaw.co.uk 17</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <p>Data Protection Act 1998</p> <ul style="list-style-type: none">• Sched.7, para.10: personal data exempt from subject information provisions if consists of information to which Legal Professional Privilege could be maintained• s.8(2): subject not entitled to have personal data communicated to him if supplying it would involve disproportionate effort• s.7(g): even if Court satisfied data controller has failed to comply with proper subject access request, has discretion not to order compliance <p>www.gsblaw.co.uk 18</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <p><i>Dawson-Damer v Taylor Wessing LLP</i> [2017] EWCA Civ 74</p> <ul style="list-style-type: none">• D-Ds beneficiaries of Bahamian discretionary trust• Discovered Bahamian trustee had made significant appointments (\$402m of £411m) out of trust fund: challenged validity• Made subject access request to TW, trustees' English solicitors <p>www.gsblaw.co.uk 19</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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Trust and Inheritance:
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<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <p><i>Dawson-Damer v Taylor Wessing LLP</i> [2017] EWCA Civ 74</p> <ul style="list-style-type: none">• TW's case (successful at first instance):<ul style="list-style-type: none">- Bahamian law protected trustees from being compelled to disclose number of trust docs, and so within LPP exception to DPA- Disproportionate for TW to conduct search to ID non-LPP data- In any event, Court should exercise discretion to refuse D-Ds' request for compliance because for collateral purpose of Bahamian litigation <p>www.ssbllaw.co.uk 20</p>	<hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <p><i>Dawson-Damer v Taylor Wessing LLP.</i> Court of Appeal decision</p> <ul style="list-style-type: none">• LPP exemption can be claimed only in respect of LPP that would be recognised in legal proceedings in UK (and trusts law on disclosure irrelevant)• Disproportionality is for data controller to prove (with evidence) and requires more than assertion would be difficult to search due to volume of data• There is nothing in DPA 1998 limiting purpose for which subject access request can be made (request for purposes of litigation not abuse of <p>www.ssbllaw.co.uk itself) 21</p>	<hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <p><i>Dawson-Damer v Taylor Wessing LLP.</i> effect</p> <ul style="list-style-type: none">• Even if beneficiary not entitled to information under principles of trust disclosure, can obtain via subject access request• Trustees and their solicitors are required to undertake onerous searches on receipt of a subject access request• Data protection regime is universal and requires trustees etc to 'arm' beneficiaries for actual or potential challenge to their decisions <p>www.gsblaw.co.uk 22</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <p><i>Dawson-Damer v Taylor Wessing LLP.</i> not as bad as it seems?</p> <ul style="list-style-type: none">• Obligation is to provide data, not documents• Non-electronic information only "data" if organised by reference to individual beneficiaries• If DPA application was abuse of process, Court may exercise discretion to refuse order for compliance <p>www.gsblaw.co.uk 23</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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**Trust and Inheritance:
Recent Developments**

<p>5 Stone Buildings</p> <p>28 November 2017 Trust Disclosure & Data Protection</p> <p>Conclusions</p> <ul style="list-style-type: none">• Trustees should be emboldened by fact no beneficiary has absolute right• But if trustees refuse reasonable request, will have to consider how can justify as proper trustee-like exercise of discretion (e.g. in interest of different class of Bs, or all Bs as whole)• Easier to refuse info re reasons than accounts• But just because could refuse as matter of trusts law, does not mean can refuse under DPA regime <p>www.5sblaw.co.uk 24</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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Retrospective Remedies

for tax problems:

Rectification,

construction and mistake

- where are we now?

Henry Legge QC

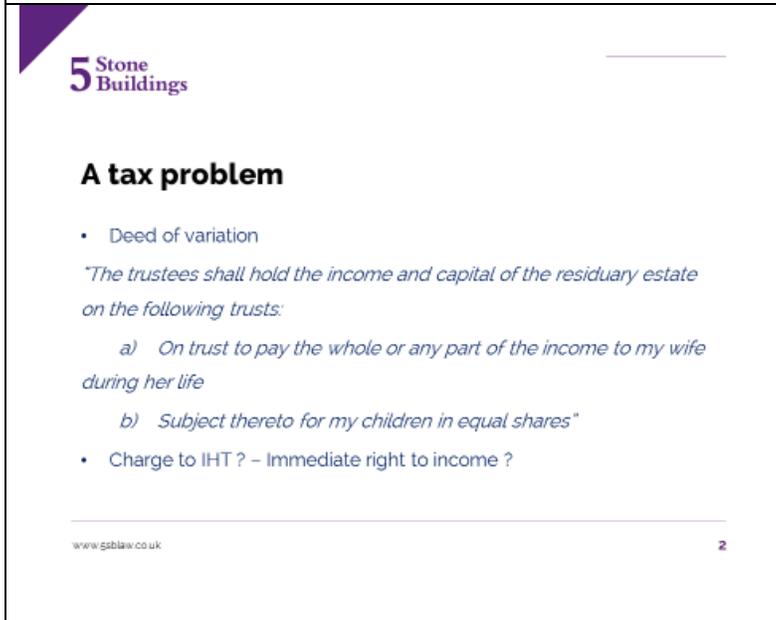
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Retrospective remedies for tax problems
Rectification, construction and mistake
- where are we now?

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A tax problem

- Deed of variation

"The trustees shall hold the income and capital of the residuary estate on the following trusts:

- a) *On trust to pay the whole or any part of the income to my wife during her life*
- b) *Subject thereto for my children in equal shares"*

- Charge to IHT ? – Immediate right to income ?

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Trust and Inheritance: Recent Developments

Remedies as Tools

- Construction
- Rectification
- Mistake

Construction/Rectification

- Two sides of the same coin: different methods of gauging the intention (nb what this means) of the parties/settlor.
- But two critical differences:
 - Admissible evidence different
 - Rectification requires order of court.
- Additional tax point:
 - Only High Court has power to rectify
 - But HMRC can insist on tax issue being heard in the FTT (*Autologic v IRC* [2006] 1 AC 118)
 - Raises possibility of two hearings !!!

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Recent Developments

Construction/Rectification: additional tax point

- Danger is two hearings, with construction in FTT and rectification in High Court
- Solution ?
 - Which issue comes first ?
 - Court can decide the rectification claim without deciding the construction claim. (See *Marley v Rawlings* [2015] AC 2 para 41. *Revern v Ayres* wrongly decided)
 - So possible to bring rectification claim on its own in the High Court
 - So, HMRC tend to be willing to agree to allow construction issue to be decided in the High Court at the same time in such a way as to bind them.
 - But in a really big case ?

Construction principles post *Arnold v Britton* [2015] AC 1619
"On trust to pay the whole or any part of the income to my wife during her life"

- Identify the intention of the parties by reference to *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"* (para 15)
- But nb that this is a process of construing the parties' intention from the language. (para 17)
- Commercial common sense has a role to play, but only as an aid to construction of the language – should not look for ambiguities in order to deploy commercial common sense (para 18)

Trust and Inheritance: Recent Developments

Construction principles post *Arnold v Britton*

- Bad news for tax cases? But *Chartbrook* para 22ff still good law
 - On the basis of the admissible evidence
 - Has something "gone wrong with the language"?
 - Is it clear what correction ought to be made in order to cure the mistake?
- Tempered by *Scottish Widows v BGC* [2012] EWCA Civ 607 para 21:
 - Must be clear what the mistake is
 - The mistake must be one of language or syntax

"Something has gone wrong with the language" Admissible evidence

- Admissible evidence
 - Old rule for "rectification by construction" was that evidence limited to the terms of the document (see eg *Schneider v Mills* [1993] STC 430 and *East v Pantiles* [1982] 263 EG 61)
 - But post *KPMG v Network Rail* [2007] Bus LR 1336, possible also to take into account "background and context" (*Chartbrook* para 24).
 - "background and context" a wide phrase (*BCCI v Ali* [2002] 1 AC 251, 260) ie all evidence admissible on construction
 - *BCCI v Ali* para 39 – no conceptual limit on admissible background:
 - anything relevant which would have affected the way in which the language of the document would have been understood by a reasonable man.

Trust and Inheritance: Recent Developments

Admissible evidence – “background and context”

- Tax legislation ?
 - *IRC v Cookson* [1977] 1 WLR 962 per Stamp LJ at 969
“The suggestion that a draftsman ought to be taken to have been aware of the fiscal consequences of what he is doing and that ambiguity should be resolved upon that basis is, in my judgment, a heresy and cannot be supported”
Contrast *BAPT v BA* [2002] Pens LR 247 para 30 : HMRC guidance for exempt approval and HMRC practice admissible
Pink Floyd v EMI [2011] 1 WLR 770 at para 21: expert evidence admissible on what the parties would have known at the time
- Precedents and practitioner practice ? Also admissible in BAPT
- State of the law (*BCCI v Ali* para 39)

Quiz

- “On trust to pay the whole or any part of the income to my wife during her life”
- Something gone wrong with the language ?
- Correction clear ?
- Interest in possession ?

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Rectification – unilateral vs bilateral

- Two tests
- "Bilateral": *Daventry DC* case [2012] WLR 1333 (para 80)
 - Common continuing intention
 - Intention continued up to time of execution of the document
 - Intention must be established objectively (formerly "outward expression of accord" ie now includes post transactional material cf *IAC v Crowhurst* [2012] PLR 371)
 - By mistake document did not reflect that intention
 - Evidence of subjective intention or "uncommunicated inner intentions" is **not** admissible

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Which test do you apply ?

- Clearly bilateral:
 - Contracts
 - Marriage settlements (*Butlin*)
- Clearly unilateral:
 - Gifts
 - Voluntary Settlements, although two parties (*Butlin*)
 - Exercise of powers with consent (eg *IBM, AMP*)
- Not a matter of the number of parties to the document but rather whether "meeting of minds" required (cf *AMP v Barker* para 66)

Rectification

- Application to deeds of variation ?
- "on trust to pay the whole or any part of the income to my wife during her life"
- Which test ?
- Whose intention to do you need to prove ?

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Mistake

- Would involve setting aside the document rather than replacing it
- Is the remedy available at all ?
 - No jurisdiction to order rescission of a contract for mistake *Great Peace Shipping [2003] QB 679*
 - But contrast the equitable jurisdiction under *Pitt v Holt* for unilateral transactions
- Difficult cases (eg deed of variation)

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<p>5 Stone Buildings</p> <p>23 November, 2017</p> <ul style="list-style-type: none">• <i>Van der Merwe v Goldman</i> [2016] 4 WLR 71 per Morgan J <p><i>"31. In my judgment, the difference between the cases where the equitable rules apply and those where they do not turns on whether consideration has been given for the benefit conferred by the transaction. If the effect of rescission (or a declaration that a transaction is void) would deprive a party of a benefit for which he gave consideration, then the common law rules apply and there is no separate equitable jurisdiction to order rescission. Conversely, if the effect of rescission would deprive a party of a benefit for which he gave no consideration, then there is a separate equitable jurisdiction to order rescission, applying the principles in Pitt v Holt."</i></p> <p>www.gsblaw.co.uk 17</p>	<hr/>
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<p>5 Stone Buildings</p> <p>23 November, 2017</p> <h3>Mistake</h3> <ul style="list-style-type: none">• May apply to only part of the document:<ul style="list-style-type: none">– <i>Kennedy v Kennedy</i> [2014] EWHC 4129 para 46 and <i>Bainbridge v Bainbridge</i> [2016] WTLR 943– What goes and what stays based on classic principles of severance? (eg <i>Hastings-Bass v IRC</i> [1975] Ch 25 at 41)• With a deed of variation could you sever part?<ul style="list-style-type: none">– Not if a contract (<i>De Molestina v Ponton</i> [2002] CP Rep 1 at para 6.1-6.8)– But not all deeds of variation are contracts... <p>www.gsblaw.co.uk 18</p>	<hr/>
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Mistake

- *"The trustees shall hold the income and capital of the residuary estate on the following trusts:*
 - a) *on trust to pay the whole or any part of the income to my wife during her life*
 - b) *subject thereto for my children in equal shares"*
- Could you set aside the deed for mistake ?
- Could you set aside just clause (a) for mistake ?

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Avoiding Probate

Disputes using Statutory

Wills and an Inheritance

Case Update

William East

**Trust and Inheritance:
Recent Developments**



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Trust and Inheritance: Recent Developments

<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <h3>Agenda</h3> <ul style="list-style-type: none">• Avoiding probate disputes using statutory will applications<ul style="list-style-type: none">– When will the Court of Protection intervene?– Advantages and disadvantages of going to the Court of Protection/ leaving it until after death– Some tips and tactics• Brief 1975 Act case update - post-Ilott decisions<ul style="list-style-type: none">– <i>Nahajec v Fowler</i> [2017] (Chancery Division, Leeds, 18 July 2017)– <i>Ball v Ball</i> [2017] EWHC 1750 (Ch) <p>www.sblaw.co.uk 2</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <h3>Wills of doubtful validity: when will the Court of Protection intervene?</h3> <ul style="list-style-type: none">• Court of Protection has no jurisdiction to rule on validity of doubtful will: <i>Re M</i> [2011] 1 WLR 344 at [50]. However, CoP does of course have jurisdiction to authorise new will to be made under best interests test.• Main authority which is often cited: <i>Re D</i> [2012] Ch. 57<ul style="list-style-type: none">– No presumption that execution of statutory will should not be ordered in cases where there is a 'dispute or uncertainty' over the validity of a recent will, terms of which departs from earlier apparently valid will– Can draw out various principles/ factors which apply in such cases from the decision– Facts of case also instructive <p>www.sblaw.co.uk 3</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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Trust and Inheritance: Recent Developments

<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <p>Re D [2012] Ch. 57 - some principles</p> <ul style="list-style-type: none">• May well be impractical and inappropriate for CoP to embark upon detailed investigation of all the evidence necessary to resolve validity dispute. Could lead to CoP concluding that inappropriate to order execution of statutory will• Part of best interests test - to look at P's wishes and feelings, includes looking at 'any relevant written statement made by him when he had capacity'. Will can be such a relevant written statement.• However weight to be attached to it depends on circumstances in which it was prepared <p>www.gblaw.co.uk 4</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <p>Re D [2012] Ch. 57 - some principles</p> <ul style="list-style-type: none">• Worry about P being remembered for having bequeathed contentious probate dispute - chimes with idea of P being remembered for having done 'the right thing' in Will• Relevant factors to take into account:<ul style="list-style-type: none">• Nature of dispute• Ability of the CoP to investigate the issues which underlie it <p>www.gblaw.co.uk 5</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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Re D [2012] Ch. 57 - some principles

- May well be impractical and inappropriate for CoP to embark upon detailed investigation of all the evidence necessary to resolve validity dispute. Could lead to CoP concluding that inappropriate to order execution of statutory will
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<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <p>Facts of Re D</p> <ul style="list-style-type: none">• P had three children (Mrs C, Mr D and Mrs S). Made will in 1995 dividing estate between each of them• 2003 - P suffers stroke• Children Mr D and Mrs A secure transfers to themselves of money and investments belonging to P. Forged power of attorney appoints Mr D. Professional deputy subsequently appointed.• 2004 - new will made, drafted by solicitors. Entire estate left to Mrs S• 2006 - further new home-made will, Mr D and Mrs S take half of estate each <p>www.gsbllaw.co.uk 7</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <p>Facts of Re D</p> <ul style="list-style-type: none">• Mrs C makes application for statutory will on two grounds:<ul style="list-style-type: none">• lack of capacity to make 2004 and 2006 wills• Material change of circumstances due to actions Mr D and Mrs S had taken since P's stroke for their own benefit• Comment from GP in support of P lacking testamentary capacity at time of application, but unable to comment on mental capacity at time of dubious wills• Paucity of evidence generally - no evidence adduced from solicitors who drafted 2004 Will <p>www.gsbllaw.co.uk 8</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p>5 Stone Buildings</p> <p style="text-align: right;">28 November 2017 Trusts and Inheritance: Recent Developments</p> <p>Facts of Re D</p> <ul style="list-style-type: none"> • Parties, including OS, agreed that estate should be split three ways as per the 1995 Will. Judge content to agree with this proposal. • 'some grounds' for questioning validity of 2004 will. (after stroke, lack of explanation for giving estate to just one child), nothing to address those concerns. • More serious concerns re 2006 Will. (no involvement of solicitors, executed some months before forged PoA), no evidence provided to support validity • Overall, sufficient doubt raised about latter two wills to set to rest all concerns about contested probate action, and for court to authorise stat will, in line with proposal. <p>www.gblaw.co.uk 9</p>	<hr/>
<p>5 Stone Buildings</p> <p style="text-align: right;">28 November 2017 Trusts and Inheritance: Recent Developments</p> <p>Re D - enquiring into the 'bare minimum'</p> <ul style="list-style-type: none"> • Re D probably not reflective of how most statutory will applications in this area go. Agreement between parties was quite significant. • Experience: <ul style="list-style-type: none"> • Much more in-depth consideration of evidence. Recent case in which court went as far as to order full schedule of allegations of undue influence to be prepared, with answers from the Respondent. Another one where evidence obtained from witness to will which supported want of knowledge and approval • Cases can involve considerable witness evidence, examination of documents including solicitors' files and files held by OPG. Myth to think that such applications will not involve significant cost <p>www.gblaw.co.uk 10</p>	<hr/>

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<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <p>Advantages of going to the CoP pre-death</p> <ul style="list-style-type: none">• Obvious one - different costs rules. Mitigates risk for client, but only to some extent• Best interests test allows you to bring in wider considerations, rather than focusing on just the relevant test of validity. E.g:<ul style="list-style-type: none">• Undue influence cases - can often point to (a) financial benefits received by person alleged to have exercised influence and (b) effect they have had in isolating P from friends and family. Conduct which can either count against beneficiary of doubtful will generally, or be presented as a 'material change of circumstances' since previous will. <p>www.gblaw.co.uk 11</p>	<hr/>
<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <p>Advantages of going to the CoP pre-death</p> <ul style="list-style-type: none">• Psychological difference? Benefits taken by beneficiary under doubtful will not set in stone, approach of the court more 'broad brush', which may assist with settlement• Ability to obtain answers about conduct as part of stat will proceedings where person accused of misappropriation of funds, if they engage in proceedings• Ability to bring in P's current wishes and feelings if appropriate• Use of FDR type settlement hearings, although also now in play in Chancery Division <p>www.gblaw.co.uk 12</p>	<hr/>

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Possible disadvantages of going to the CoP pre-death

- Court might conclude that not appropriate for it to deal with dispute. But reluctance of court for P to bequeath contentious probate dispute
- Inevitably, range of evidence court will consider more limited - less likely to be able to call on expert evidence for example (although sometimes experts available who assessed P contemporaneously)
- As approach more broad brush, may not get all out victory you might get in the High Court in a very strong case

Some tips and tactics

- See if can encourage professional deputy to take on risk and bring application
- Holding wills - despite terms of s. 48 MCA 2005, court can on occasion be willing to make holding will where P is aged and evidence of invalidity is strong
- Consider not just cases where will made which is of doubtful substantial validity, but also cases where will clearly formally invalid but wishes of P were clear
- Always try and bring in other considerations than just mere invalidity when considering evidence and advancing application

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<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <h3>The post-Ilott world: <i>Nahajec v Fowle</i></h3> <ul style="list-style-type: none">Facts:<ul style="list-style-type: none">Estate worth £265,000, left entirely to a friend (Stephen)Claimant (Elena) was one of three children of the deceased, aged 31Will accompanied by letter explaining no provision for the children because he had not '<i>seen or heard from any of my children in the last 18 years</i>'; children all of '<i>independent means</i>' <p>www.gsbllaw.co.uk 15</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <h3><i>Nahajec v Fowle</i>: facts continued</h3> <ul style="list-style-type: none">Elena's needs and resources: living in rental accommodation, owed £6500, mostly in payday loans. Said could live within means once loans paid off. Had plans to become veterinary nurseEvidence regarding relationship: Deceased had cut her off after initial break up with her mother, rekindled relationship, but then cut her out again over her choice of boyfriendStephen's defence: had been friend of Deceased for many years, looked after him whilst suffering from cancer to detriment of own business. Had used money from estate in various ways, paying off debts, reducing mortgage liability and by putting money into business. Spent considerable sums, including on Rolex watches/ wedding, after letter of claim served. <p>www.gsbllaw.co.uk 16</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <p><i>Nahajec v Fowle: the law</i></p> <ul style="list-style-type: none">• Ref to para 20 of <i>Ilott</i>, judgment of Lord Hughes:<ul style="list-style-type: none">• No requirement for a moral claim for applications under the Act, without which no claim at all• However, in practice - <i>'In the case of a claimant adult son well capable of living independently, something more than the qualifying relationship is needed to found a claim.. Clearly the presence or absence of a moral claim will often be at the centre of the decision under the 1975 Act'</i> <p>www.gblaw.co.uk 17</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <p><i>Nahajec v Fowle: conclusion</i></p> <ul style="list-style-type: none">• Judge focused analysis on whether claimant could show something more than qualifying relationship. She could:<ul style="list-style-type: none">• She had consistently tried to rekindle relationship with her father, absence of relationship was not her fault• Claimant far from well off and not profligate• Had a genuine and not fanciful aspiration to improve herself by becoming a veterinary nurse <p>www.gblaw.co.uk 18</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <p><i>Nahajec v Fowle</i>: award</p> <ul style="list-style-type: none">• Claimant sought £70,227, which included course fees for nursing course, transport costs during course, sums to discharge loans, sums for monthly maintenance during course.• Was a '<i>significant contingency aspect</i>' to course as needed to re-take GCSEs first. Judge therefore decided to apply discounting to award.• Course fee costs of £11,356 partially excluded on grounds of concession that could be funded by student loan• Final award: £30,000.• Judge - no two cases the same. But made explicit cross reference to award as percentage of estate in <i>Ilott</i>. <p>www.gsblaw.co.uk 19</p>	<hr/>
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<p>5 Stone Buildings</p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <p><i>Ball v Ball</i> [2017] EWHC 1750 (Ch) - facts</p> <ul style="list-style-type: none">• Contentious probate claim with 1975 Act claim in alternative.• Deceased made will in 1992 excluding 3 of children from benefit in favour of remaining 8 children and 1 grandchild between whom estate divided.• Basis for exclusion - claimants had reported father (husband of Deceased) to police for sexual abuse. Although some of the allegations found to be made out, Deceased (a) put out by fact that claimants had reported their father and (b) considered that some of complaints exaggerated.• Probate claim failed on all grounds <p>www.gsblaw.co.uk 20</p>	<hr/>
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<p> 20 November 2017 Trusts and Inheritance: Recent Developments</p> <p>Ball v Ball [2017] EWHC 1750 (Ch) - facts</p> <ul style="list-style-type: none">• Value of estate £157,000 - so very small• All three of claimants had for a long time been living apart from parents in own homes and with their own partners/ spouses and children <p><small>www.gblaw.co.uk</small> 21</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p> 20 November 2017 Trusts and Inheritance: Recent Developments</p> <p>Ball v Ball [2017] EWHC 1750 (Ch) - legal analysis</p> <ul style="list-style-type: none">• Following <i>Ilott</i>, need demonstrated by claimants not enough. <i>'There must be something else. It may be a moral claim, or it may be some other circumstance'</i>• Estrangement can be taken into account, but 1975 Act jurisdiction not about creating <i>'rewards for good behaviour on the part of the claimant or penalties for bad on the part of the deceased'</i>. 1975 Act jurisdiction not some kind of statutory Court of Appeal from the judgments of parents in bringing up children <p><small>www.gblaw.co.uk</small> 22</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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Ball v Ball [2017] EWHC 1750 (Ch) - decision

- Not apparent that estrangement fault of Deceased - could not be criticised by standards of the time for having taken issue with claimants reporting abuse to the police/ for having thought that they exaggerated abuse. No moral obligation created.
- None of the claimants below breadline or in need of further income for maintenance. Claimants not worse off than defendants and on some measures were better off.
- Claim dismissed.

Ball v Ball [2017] EWHC 1750 (Ch) - legal analysis

- Following *Ilott*, need demonstrated by claimants not enough. '*There must be something else. It may be a moral claim, or it may be some other circumstance*'
- Estrangement can be taken into account, but 1975 Act jurisdiction not about creating '*rewards for good behaviour on the part of the claimant or penalties for bad on the part of the deceased*'. 1975 Act jurisdiction not some kind of statutory Court of Appeal from the judgments of parents in bringing up children

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<p></p> <p>28 November 2017 Trusts and Inheritance: Recent Developments</p> <p><i>Ball and Nahajec</i>: some conclusions</p> <ul style="list-style-type: none">• Guidance given by Lord Hughes on showing something more than just the qualifying relationship in <i>Ilott</i> now very important• In <i>Ball</i>, size of estate and lack of demonstrable need of claimants real problems for the claim. However, judge also much more reluctant than in <i>Nahajec</i> to ascribe fault to deceased for estrangement.• <i>Nahajec</i> - fact estrangement was fault of the deceased, claimant's desire to improve herself by taking course meant she had more than qualifying relationship• <i>Nahajec</i> - interesting approach to 'contingent needs' <p>www.5sblaw.co.uk 25</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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A Wills Act 2020?

Barbara Rich

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A WILLS ACT 2020?

INTRODUCTION

In July 2017 the Law Commission published its consultation paper on “Making A Will”. This is a wide-ranging general review of the law of making and interpreting wills, both wills made by adults who have capacity to do so for themselves, and statutory wills authorised by the Court of Protection for adults who lack testamentary capacity. The Law Commission’s stated reason for undertaking this review is that:

The law of wills needs to be modernised to take account of the changes in society, technology and medical understanding that have taken place since the Victorian era.

The consultation closed on 10 November 2017. The Law Commission has reported that it has received 177 responses. Some of the representative professional bodies have published their responses. The Law Commission is currently analysing these responses and will produce a further report once it has done so. The target date for this is late 2018.

Is it possible that there will be a Wills Act 2020, bringing some of these changes into force? The Law Commission say (paragraph 1.25) that

We do see one result of this project as being the creation of a more modern and improved Wills Act, to replace the Wills Act 1837

If so, they will make a great difference to all lawyers who deal with wills, whether their focus is on non-contentious advice and will-drafting, or on the disputed validity or interpretation of wills. It is of great interest to us at 5 Stone Buildings,

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as the validity and interpretation of wills has traditionally been a core area of practice in chambers, and continues to be so today. The consultation papers refers to many decided cases in which members of chambers have acted, and to a chapter written by Penelope Reed QC in a recent book on succession law.

The Law Commission's paper is very wide-ranging. The chapter-headings of the consultation paper alone give an idea of its breadth. It covers:

- testamentary capacity
- statutory wills
- supported will-making
- formalities
- electronic wills
- protecting vulnerable testators: knowledge and approval and undue influence
- children making wills
- interpretation and rectification
- ademption
- revocation
- mutual wills

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- *donationes mortis causa* (deathbed gifts)
- “other things a will could do”

The paper raises 64 questions for consultation. The very first question is whether the word “testator” should be replaced by another term – either “will-maker” or something else. It’s not easy to think of a single clear English word to replace “testator” – one aspect of clarity being to avoid any confusion between the person whose will it is, and the person “making” it in the sense of drafting it, which is a problem with “will-maker”.

The Law Commission team explained at one of the workshops I attended that they have adopted three guiding principles (paragraph 1.30):

- To support the exercise of testamentary freedom
- To protect testators in a way which responds to the needs of an ageing population which is at risk of financial fraud
- To ensure that the law is clear and certain, not only for lawyers professionally engaged with it day in and day out, but for people who only occasionally come into contact with it.

As the Law Commission recognise, these principles can pull in different directions, and there is work to be done in trying to find an appropriate balance between them.

It would be impossible in a short talk to do justice to all these topics and consultation questions. Instead, I am going to highlight some which are of

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particular interest and to which the published response promises some further debate.

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TESTAMENTARY CAPACITY AND STATUTORY WILLS

2 People who lack capacity

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to—
 - (a) a person's age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
- (5) No power which a person ("D") may exercise under this Act—
 - (a) in relation to a person who lacks capacity, or
 - (b) where D reasonably thinks that a person lacks capacity,is exercisable in relation to a person under 16.
- (6) Subsection (5) is subject to section 18(3).

3 Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
 - (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
 - (a) deciding one way or another, or
 - (b) failing to make the decision.

Since the Mental Capacity Act 2005 ("the MCA") came into force ten years ago, a substantial debate has developed as to whether the MCA test of capacity to make a decision has superseded, or should supersede, the well-known common law test for wills in *Banks v. Goodfellow* (1870) LR 5 QB 549:

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“It is essential ... that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made”

The last judicial word on this debate was *Walker v. Badmin* [2014] EWHC 71 (Ch), and in the Court of Appeal, in *Simon b. Byford* [2014] EWCA Civ 280 (although obiter as the will in that case was made before the MCA came into force). In *Walker* the deputy High Court judge, Nicholas Strauss QC, said that his first impression on considering the issue was that the statutory test superseded the common law, but he was persuaded that this was wrong, and that the statutory test was not intended to affect a retrospective decision by a court as to whether a testator had capacity to make his own will. He also said that even if the statutory test had applied, the result would have been the same, and inevitably this will often be the case. He identified three differences between the statutory test and the common law test of capacity:

- (1) Burden of proof. The statutory presumption of capacity applies to all MCA decisions, but the common law burden of proof in a disputed testamentary capacity case starts with the person(s) propounding the will and can shift forensically as the case develops.
- (2) There is no precise common law equivalent to the important element of the statutory test which is that a person must be able to “understand the information relevant to the decision”. In the common law test, the question is whether or not the testator understands the extent of his property and the claims to which he ought to give effect.

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- (3) The statutory test has an extended definition of “information relevant to a decision” which includes information about the reasonably foreseeable consequences of (a) deciding one way or another, or (b) failing to make the decision. There is no equivalent to this in the common law test: for example, the common law test does not explicitly require capacity to understand that failing to make a will results in intestacy or in an earlier will being admitted to probate. But this is surely implicit in the words of the common law test “that a testator shall understand the nature of the act and its effects”?
- (4) A further problem, identified by Penelope Reed QC is the divergence between the common law test and the statutory test in circumstances where there has been a significant passage of time between giving instructions for the will and executing it. Under the common law rule in *Parker v. Felgate*, more recently re-affirmed in *Perrins v. Holland*, the testator does not require full testamentary capacity at the later date, providing he is capable of understanding that he is executing the will for which he previously gave instructions. This is different from the decision-specific, time-specific approach of the MCA.

The Law Commission’s analysis leads to the following questions and proposals:

Firstly, a proposal to adopt the statutory test in place of the common law test:

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Consultation Question 3.

We provisionally propose

- (1) that the test for mental capacity set out in the Mental Capacity Act 2005 should be adopted for testamentary capacity; and
- (2) that the specific elements of capacity necessary to make a will should be outlined in the MCA Code of Practice.

Do consultees agree?

Secondly, if that proposal is not adopted, whether the current common law test should be put on a statutory footing:

Consultation Question 4.

We invite consultees' views on whether, if the Mental Capacity Act 2005 is not adopted as the test for testamentary capacity, the *Banks v Goodfellow* test should be placed on a statutory footing.

Consultation Question 5.

We invite consultees' views on whether any statutory version of the test in *Banks v Goodfellow* should provide:

- (1) a four limbed test of capacity, so that the relevance of the testator's delusions or disorder of the mind (or other cause of capacity) is not confined to understanding the claims on him or her;
- (2) that a testator's capacity may be affected by factors other than delusions or a disorder of the mind; and
- (3) clarification that the testator must have the capacity to understand, rather than actually understand, the relevant aspects of a will.

And thirdly, whether the statutory version of *Banks v. Goodfellow* should be modernised and refined in certain ways.

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And finally, if a reformed version of *Banks v. Goodfellow* is put on a statutory footing, whether it should include a statutory presumption of capacity. The Law Commission propose that it should.

Assessment of capacity and the “golden rule”

A section of the consultation paper deals with rationalisation of the “golden rule” i.e. when should a lawyer ensure that there is an assessment of a testator’s capacity, and who should carry out and record that assessment. The Law Commission’s conclusion is that there should not be a formal certification scheme for assessors, but that there should be a non-statutory code of practice to provide guidance on when, by whom and how a testator’s capacity should be assessed. At the workshops which I attended (one in conjunction with STEP and one in conjunction with the Chancery Bar Association) there was general opposition to the idea of a code of practice, although the published response of the Law Society welcomes this proposal. People were concerned that it could become a potential source of litigation in its own right, and that it was wrong for the government to seek to enact and regulate standards in professions which are otherwise regulated. There was also opposition to the idea of accreditation or certification for third-party assessors.

As regards statutory wills, the consultation summarises the debate over whether the statutory best interests test is the right approach to making a statutory will: one academic commentator (Professor Rosie Harding of Birmingham Law School) has argued that

“statutory wills may sometimes operate on the basis of a pragmatic distribution of assets; that is as a result of argument and compromise between the competing members of the testator’s family, rather than being

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determined by the testator's best interests. It may be, however, that a pragmatic distribution, which avoids any costs associated with post-death litigation, is in the testator's best interests in the sense that it is unlikely that the testator would wish his or her estate to be depleted by the costs of such litigation, if it can be avoided."

The Law Commission conclude that reform is not required of any of

- (1) The best interests test
- (2) The way in which the discretion is currently exercised by the Court of Protection, or
- (3) To restrict the circumstances in which a statutory will can be made

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FORMALITIES AND “ELECTRONIC WILLS”

The consultation paper reviews the formalities for making a will in detail and seeks consultees’ views on whether the current rules deter people from making wills. It proposes removing the reference to “attestation” of witnesses’ signatures in s9(d)(i) of the Wills Act 1837. The most significant proposal that is made in the consultation is for the introduction of a “dispensing power” to recognise a will as valid even though formalities have not been complied with.

Formalities can serve a number of functions (see paragraph 5.6 of the consultation):

- As evidence that the will was made by the person whose name it bears, at a time when s/he is no longer alive to authenticate it
- To ensure that the person making the will understands the seriousness of what s/he is doing and thinks carefully about what s/he wishes to achieve, and to avoid accidentally creating a legally binding document which does not in fact contain his or her thought-through final wishes
- To standardise a well-understood means of transferring property on death
- To protect the person making the will from fraud or undue influence” “the first line of defence against fraud upon the dead” as they were described in one mid-20C case.

If there were no formality rules, there would be a risk that wills which were not the true last wishes of the people who made them would be admitted to probate. But the existence of formality rules also prevents some genuine expressions of last wishes from being admitted to probate, so there is a difficult

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question of balance in creating a formality rule, and any exception(s) to it. The current law in England and Wales requires formalities, but also relies on a presumption of due execution, even for a will which is informal and does not contain a standard clause (an attestation clause) dating the will and stating that it has been signed by the person making it in the presence of two witnesses who have themselves signed as witnesses in the presence of the person making the will. This means that any challenge to the validity of an English will based on non-compliance with formalities must positively prove non-compliance if it is to succeed.

The Law Commission's consultation also reviews the "dispensing powers" which exist in all Australian states, New Zealand and a number of states and provinces within the USA, Canada and South Africa. The Law Commission's consultation paper discusses intention-based dispensing powers and provisionally proposes introducing such a power in England and Wales. It asks consultees whether they agree with this proposal:

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Consultation Question 28.

We provisionally propose that a power to dispense with the formalities necessary for a valid will be introduced in England and Wales.

We provisionally propose a power that would:

- (1) be exercised by the court;
- (2) apply to records demonstrating testamentary intention (including electronic documents, as well as sound and video recordings);
- (3) operate according to the ordinary civil standard of proof;
- (4) apply to records pre-dating the enactment of the power; and
- (5) allow courts to determine conclusively the date and place at which a record was made.

Do consultees agree?

The consultation paper also considers “electronic wills”, in other words, valid and executed wills which are created and exist other than on paper. No major jurisdiction as yet has a successful legislative scheme for such wills, and electronic wills have never been recognised as valid in England and Wales. It is undecided whether a completely electronic will could be accepted both as “writing” and as “signed” for the purposes of the Wills Act 1837. The Law Commission provisionally proposes that

- (1) An enabling power should be introduced that will allow electronically executed wills or fully electronic wills to be recognised as valid, to be enacted through secondary legislation

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- (2) The enabling power should be neutral as to the form that electronically executed or fully electronic wills should take, allowing this to be decided at the time of the enactment of the secondary legislation, and
- (3) Such an enabling power should be exercised when a form of electronically executed will or fully electronic will, as the case may be, is available which provides sufficient protection for testators against the risks of fraud and undue influence.

The Law Society's response to this is that it is "not opposed to the possibility that wills may, at some point, be made electronically" but goes on to say

"However, we urge caution against proposals to usher in fully digital processes for making wills at this point in time. Without access to a detailed proposal of how a digitalised system might operate in practice and guidance to accompany such, it is difficult to picture how this could be implemented. We strongly recommend that, should the infrastructure for electronic wills become available, a comprehensive consultation exercise should be carried out to assess the need for such, as well as the risks and benefits it presents."

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A DISPENSING POWER & ELECTRONIC WILLS IN PRACTICE

During the consultation period, the following headline appeared on the BBC news website.

“Unsent text accepted as dead man’s will by Australian court”

On 11 October 2017, this headline appeared on the BBC news website. The story naturally aroused a lot of interest and discussion. The BBC news story, which appeared in the “Technology” section of its website rather than as a story about the law, does not link to the text of the judgment of the Supreme Court of Queensland, published on 9 October 2017, but this is publicly available on the AUSTLII website, and reported as *Re Nichol; Nichol v Nichol* [2017] QSC 220.

In its original version the BBC news story also made no reference to the fact that the court in Queensland – the Australian state where the case was decided – was applying a law which allowed it to dispense with formality in making a valid will, or that there is a live possibility of a similar law coming into force in England and Wales. This is one of the most important aspects of the story for an English reader. The decision gives a practical example and context for considering the Law Commission’s proposals in relation both to dispensing with formalities and to validating electronic wills.

The history of the unsent text

As so often, the story behind the case is a very sad one. Mark Nichol, a man of 54 who lived in a suburb of Brisbane, killed himself in a shed at his home in October 2016, having apparently made a previous suicide attempt in June 2016. On 10 October 2016, his wife Julie found his mobile phone alongside his body, on a workbench in the shed. The following day, 11 October, Julie asked a friend of hers, Alicia McDonald, to access the mobile phone to look through the contact list to see

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who should be notified of Mark's death. Alicia told Julie she had found an unsent text message, and one of Mark's nephews took a screenshot of it. It read:

Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten . A bit of cash behind TV and a bit in the bank Cash card pin 3636

MRN190162Q

10/10/2016

My will

The judgment records that the abbreviation MRN190162Q matched Mark Nichol's initials and date of birth, 19 January 1962. The Q isn't explained, but perhaps stands for Queensland, the state in which he lived. There was a paperclip symbol (indicating an attached image) on the left of the words "my will" and a smiley face of the other side.

There was no dispute that the text message was addressed to David Nichol, who was Mark's brother, and whose contact details were stored in the phone's memory under the name "Dave Nic". Mark Nichol's former wife Patricia (presumably the "Trish" referred to in the text), was dead. Mark had remarried, having been in a relationship with his wife Julie for about three and a half years, and married for a year. Mark also had an adult son, Anthony, who is not mentioned in the text. The judge said that it was

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uncontroversial that the relationship [with Julie] had problems and that [Julie] had left the deceased on at least three occasions, the final time being some two days prior to his death. It should be said, notwithstanding that [Julie] had moved out, she still made arrangements to take the deceased to his mental health appointments and that they spent the weekend prior to his death together.

Mark had never made a will before, although he had talked both to Julie and to his mother on different occasions about having made one. David also gave evidence about conversations he had had with Mark, in which Mark had said that he wanted all his possessions, including his house and his superannuation fund, to go to David.

The phone was forensically examined and the examiner confirmed that the message had not been sent, and that it was likely to have been saved unsent by someone pressing the back arrow on the message editing screen. The date of its creation could not be pinpointed beyond confirming that it was created at some time prior to the point when Alicia had accessed it on 11 October 2016.

Julie did not think that the text message should be regarded as a valid will, and applied to court for letters of administration on intestacy, under which she and Mark's son Anthony would have been entitled to Mark's estate. She was supported by Anthony. David Nichol, and his son Jack contested this application, and instead asked the court to make a declaration under Queensland law that the text message was a will, even though it had not been executed as a will in accordance with the usual legal formalities. They were supported by Mark's mother, and by another brother, Bradley Nichol.

Julie argued that the fact that the text was unsent showed that Mark had not made up his mind that it was to be his will. David and Jack's response to that was that

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the fact the text message was not sent does not indicate that the text message was not intended to have effect. [David and Jack argue] that the likely intent of the deceased was that the text message be found after he had killed himself. If he had sent that message before he took his life then David Nichol or Jack Nichol would have invariably attempted to take steps to try to stop the deceased.

In a report of the case in the Daily Mail, Mark's son Anthony is quoted as saying:

If you knew my father, that wasn't his last will and testament – that was him being sarcastic

They were not his wishes, they were more sarcasm.

But the judgment records that Anthony did not give evidence, and that other witnesses gave evidence of a difficult relationship and limited contact between Mark and Anthony. The judge also commented that there was “obvious antagonism” between Julie on the one hand and David and Jack on the other, and that a lot of the written evidence was “unnecessarily inflammatory and unhelpful”. None of the witnesses were cross-examined on their evidence.

The Queensland law on dispensing with formalities

Section 10 of the Succession Act 1981 in Queensland sets out how a will must be executed. It says

(2) A will must be—

(a) in writing; and

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- (b) signed by—
 - (i) the testator; or
 - (ii) someone else, in the presence of and at the direction of the testator.
- (3) The signature must be made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time.
- (4) At least 2 of the witnesses must attest and sign the will in the presence of the testator, but not necessarily in the presence of each other.
- (5) However, none of the witnesses need to know that the document attested and signed is a will.
- (6) The signatures need not be at the foot of the will.
- (7) The signature of the testator must be made with the intention of executing the will.

These formalities are very similar those which apply in England. But the law in Queensland contains a power – which English law does not – to dispense with the formal execution requirements of a will. Section 18 of the Queensland Succession Act 1981 provides as follows:

18 Court may dispense with execution requirements for will, alteration or revocation

- (1) This section applies to a document, or a part of a document, that—

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(a) purports to state the testamentary intentions of a deceased person; and

(b) has not been executed under this part.

(2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's will, an alteration to the person's will or a full or partial revocation of the person's will.

(3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to—

(a) any evidence relating to the way in which the document or part was executed; and

(b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.

(4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).

The heart of this provision is in the words of s18(2). It requires a judge to be satisfied that the person "intended the document ... to form the person's will". This intention-based approach is a 2006 revision of the law as originally enacted in 1981, and which looked to the question of whether or not there had been substantial compliance with strict formality rules.

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An intention-based approach means that the judge must form inferences from all of the evidence including evidence of the type described in s18(3). Unsurprisingly, in one of the earlier cases quoted by the judge in *Nichol*, the judge had said

Great care is to be taken in the evaluation of the relevant evidence.

The judge went on to refer to some other previous decisions in Queensland and set out what she described as the three conditions for s18 to operate:

- Was there a document?
- Did that document purport to embody the testamentary intentions of the relevant deceased person?
- Did the evidence satisfy the court that either, at the time of the document being brought into being, or, at some later time, the relevant deceased person, by some act or words, demonstrated that it was her, or his, then intention that the document should, without more on her, or his, part operate as her, or his, Will?

Another evidential hurdle for anyone seeking to prove an informal will in Queensland is that the court does not presume that the person who made it had the mental capacity to make a will, so this must be proved by the person putting forward the will as valid.

The decision of Brown J that the message was a valid will

The judge was satisfied that the text message was an electronic document which satisfied the definition of a document for s18, and that it purported to state Mark's testamentary intentions i.e. his wishes or intentions in relation to his property on his death. The text said that it was "my will" and it identified all the significant

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assets that Mark had, and where he wanted his ashes placed. Many lawyers who specialise in this field will have seen home-made wills which are less comprehensive and less clear than this. The judge said that the “informal nature” of the text did not prevent it from being sufficient to represent testamentary intentions, referring to an earlier case where a testator had written “my will” on a DVD in which he had recorded his intentions. The most difficult issue for the judge to decide was whether Mark intended the unsent text to operate as his will. She was satisfied that he was able to function and think normally, despite the previous suicide attempt and the fact that he was receiving counselling, and that he had capacity to make a will. She was also satisfied that Mark “appreciated the significance of what he was doing by creating the text message”, and including the words “my will”. She identified the circumstances which satisfied her that he did intend the unsent message to be his will:

- The fact that it was created on or about the time that Mark was contemplating death, and included an indication as to what should be done with his ashes
- The fact that the phone was with him in the shed when he died
- The fact that the text dealt with the disposition of Mark’s assets and made it clear he did not wish to leave Julie anything. The judge found this exclusion was explicable, as at the time of Mark’s death she had moved out, and the relationship had been relatively short. The judge also found that the lack of a constant relationship with Anthony provided a rational explanation as to why he was not referred to in the text message.
- The level of detail in the message, including the directions about where to find cash and access the bank account, and the words “my will”

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- The fact that Mark had not expressed any contrary wishes or intentions in relation to his estate to those in the message

She said

The terms of the text message reflect that [Mark] wished the document to be his final will and was not merely an emotional expression of wishes . . .

I do not consider the fact that the message was saved as a draft message and that he did not send it, is evidence that he did not wish the text message to be operative as his will. Rather, I find that having the mobile phone with him at the place he took his life so it was found with him and not sending the message, is consistent with the fact that he did not want to alert his brother to the fact that he was about to commit suicide, but did intend the text message to be discovered when he was found.

Should there be a dispensing power in England and Wales?

Most of the instant reaction that I have read to the decision in *Nichol* has been hostile to the idea that an unsent text message could be regarded as a valid will. Comments on articles in the Daily Mail are a limited barometer of public opinion, but their general view is summed up in these:

This is ridiculous, if he'd wanted that then why didn't he send the text? And as argued, anyone could have written that, whoever found the phone could have, as it wasn't sent with a date stamp prior to his death there's no way of knowing. Honestly don't understand why any judge would accept that.

and

Antipodes law?? What a stupid verdict from stupid judges. The whole point of written wills and witnesses is to stop claims such as these.

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Lawyers' reaction to the news story has been very similar – this is representative of other comments I've read.

Bemusing decision from Down Under. All sorts of reasons why this text remained in draft form! Cannot believe this is undoubted true wishes!

Having carefully read both the judgment in *Nichol* and the Law Commission's consultation paper and proposal, and reflected on these comments, I am in favour of an intention-based dispensing law such as that proposed by the Law Commission. The expression of testamentary intention in a text message reflects a reality of contemporary life for many people – a phone is the instrument of communication and record which is always at hand. Many of the formalities which would have been standard in business letters a couple of decades ago, let alone the formalities required by section 9 of the Wills Act 1837, seem archaic, in an age where the majority of business correspondence is conducted by email, and monarchs and heads of state express their thoughts on Twitter. It's an irony of an age which is impatient with or ignorant of the traditional formalities of wills, that it is also constrained by a different type of formality imposed by information technology: the password rage induced by mistyping half-remembered names of childhood pets into a box on a computer screen, or having an email bounce back because of a single-character error in typing the address.

Although treating an unsent text message as a valid will seems very surprising without knowing the factual context, the full story explains the decision. I wonder how many other commentators might reconsider their views in the light of reading the full judgment? In most circumstances, an unsent text message would be seen as tentative rather than conclusive, and unless a phone is securely password-protected (there was no evidence about this in the *Nichol* case, and I have assumed that it was not password-protected) it is obviously easy for someone else either to

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type their own message, or, a more obvious risk, to delete something which has previously been typed but not sent. But in circumstances where the phone is found, as here, in proximity in place and time to a person who has taken his own life, and where suicide also provides an explanation for leaving the message unsent to its ultimate intended recipient, the conclusion of the judge becomes more compelling. They are unusual circumstances, but not entirely extraordinary. I think that, quite contrary to being a “stupid verdict”, the decision well illustrates how a judicially-exercised power to dispense with formalities where the intention to make a will is proved, could be a valuable addition to the law of wills in England and Wales. And if such a change in the law was made, a text message reading “All 4 U” might one day qualify as the shortest will ever written.