

## Private Client Business

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### Will drafting pitfalls

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***\*P.C.B. 59** Recent changes in the law as a result of scientific and social advances may affect the way in which testamentary documents are drafted and have created potential hazards for the unwary draftsman. This article aims to highlight some of the potential dangers for Will draftsmen and outline what information practitioners should obtain to ensure that the testator's wishes are achieved.*

Testamentary gifts are often made by reference to a person's relationship with the testator. When identifying the possible class of beneficiaries, therefore, the draftsman will need to consider whether, and when, illegitimate, legitimate and adopted children, and children conceived using fertility treatment, should be expressly included or excluded. Where Wills are being drafted for spouses or civil partners, practitioners will also need to consider whether a survivorship clause is appropriate.

### The Human Fertilisation and Embryology Act 2008

The Human Fertilisation and Embryology Act 2008 received Royal Assent on November 13, 2008 and the majority of provisions came into force in two stages in April and October 2009. A small number of sections have still to come into force.

The Human Fertilisation and Embryology Act 2008 was the culmination of a review of the existing law on assisted reproduction and amends the Human Fertilisation and Embryology Act 1990 in the light of developments in fertility ***\*P.C.B. 60*** treatment and changes in social attitudes reflected in recent equalities legislation, the widening of the adoption law and the Civil Partnership Act 2004. As well as tightening controls over use of human embryos and prohibiting sex selection for offspring for non-medical reasons, the Human Fertilisation and Embryology Act 2008 governs the circumstances in which the non-genetic parent in same-sex couples may be recognised as the legal parent of a child conceived through the use of donated sperm, eggs or embryos or as a result of fertility treatment. The impact of the Human Fertilisation and Embryology Act 2008 is, therefore, important for the meaning of "children" and therefore "remoter issue" in Will drafting.

#### ***Mother***

A child's mother will always be the person who carried the child, regardless of her biological status.<sup>1</sup> A woman conceiving using donor eggs therefore will be the child's legal mother, although the egg donor's details will remain on the Human Fertilisation and Embryology Act Register of Information and the child may access these in adulthood.

#### ***Heterosexual couples***

Where fertility treatment occurred on or after April 6, 2009, a man may be the father of the child in the following circumstances:

- if he is married to the mother at the time of the treatment (wherever the treatment takes place), unless he did not consent to the fertility treatment<sup>2</sup>; or
- if he and the child's mother are unmarried, the fertility treatment takes place in a licensed UK clinic, both partners consent in writing to the male partner being treated as the father and the partners are not within prohibited degrees of relationship in relation to each other (which excludes close relatives).<sup>3</sup>

Where the fertility treatment occurred on or after August 1, 1991 but before April 6, 2009, the provisions are governed by the Human Fertilisation and Embryology Act 1990, so that a man may be the father of the child in the following circumstances:

- if he was married to the mother at the time of the treatment (wherever the treatment takes place), unless he did not consent to the fertility treatment<sup>4</sup>; or

**\*P.C.B. 61** • if he and the child's mother were unmarried and the fertility treatment was provided to the man and the woman together in a licensed UK clinic.<sup>5</sup>

Thus, the male partner of an unmarried couple will not qualify for automatic parenthood if the child was conceived outside the United Kingdom or at home. In these circumstances, the male partner will need to apply for an adoption or residence order for the child to be treated as his legally.

Where the fertility treatment occurred before August 1, 1991 the child's legal parentage will be his or her genetic parents unless the child was born on or after April 4, 1988 as a result of artificial insemination, in which case the mother's husband will be treated as the child's father, unless he did not consent to the fertility treatment.<sup>6</sup> In this case the crucial date is the date of *birth* and not the date of the fertility treatment.

A child may only have one "father", so if someone else is treated as the second parent, the genetic father will not be the child's legal father.<sup>7</sup> A sperm donor therefore will not be a "parent", although his details will remain on the Human Fertilisation and Embryology Act Register of Information and the child may access these in adulthood.

### ***Female couples***

The child's birth mother will always be the child's mother.<sup>8</sup>

Where fertility treatment occurred on or after April 6, 2009, and the couple were civil partners at that date, the same rules apply as for married couples. Thus, the non-birth mother will be recognised as the child's legal "parent", unless she did not consent to the fertility treatment, irrespective of whether the treatment takes place at a licensed UK clinic or through artificial insemination at home.<sup>9</sup>

Where female couples are not civil partners at the date of the fertility treatment, the rules for unmarried heterosexual couples apply so that the non-birth mother will be recognised as the child's second parent if the treatment is received at a UK licensed clinic and both parties gave written consent to the child's parentage. Thus, the non-birth partner of a female couple who are not civil partners will not qualify for automatic parenthood if the child is conceived outside the United Kingdom or at home. In these circumstances, the non-birth mother will need to apply for an adoption or residence order.

**\*P.C.B. 62** Where the fertility treatment occurred between August 1, 1991 and April 6, 2009, the non-birth mother in a female relationship (whether a civil partner or not) does not have the right to be automatically recognised as the child's second parent, although she can acquire parental status by adopting the child.

Where the non-birth mother is treated as the child's "parent", no man will be treated as the father of the child.<sup>10</sup>

### ***Male couples***

The rules governing the status of male civil partners and unmarried male couples remain unchanged under the Human Fertilisation and Embryology Act 2008 so that a man who is not a child's genetic father will be treated as the child's second parent only if he adopts the child. This represents a difference from female couples, albeit one created by biology (as there will always be a birth mother) and not policy.

### ***Surrogacy***

A surrogate mother who carries a child for a couple is treated as the child's mother.<sup>11</sup> A couple may, however, obtain a parental order from a UK court within six months of the child's birth to allow the child to be treated legally as their own in the following circumstances:

- at least one of the couple is the child's genetic parent;
- the couple are husband and wife, civil partners or an unmarried couple living as partners in an "enduring family relationship and not within prohibited degrees in relation to each other" (which

excludes close relatives); and

- no money or other benefit (aside from reasonably incurred expenses) has been given or received between the parties to the surrogacy arrangement.<sup>12</sup>

### ***How do the rules affect “children”?***

Clients who have conceived through assisted reproduction will presumably wish to include the child in their Wills and practitioners may wish to refer to the child by name to ensure they are specifically included in the class of beneficiaries. If the gift is to the testator's “children” the draftsman will need to look carefully at the circumstances and the date of the assisted reproduction, and any subsequent events (such as adoption), to ascertain the child's legal parentage and advise on whether they need to be specifically included in the Will.

**\*P.C.B. 63** Where a testator wishes to include a gift to a wider class of beneficiaries, for example “to my grandchildren”, the issue for the draftsman is whether any of the potential beneficiaries were conceived through assisted reproduction and/or if future potential beneficiaries might be conceived in this way. In these circumstances the draftsman will need to obtain instructions on whether potential beneficiaries conceived through assisted reproduction should be specifically included or excluded.

Where a child is not included in the class of “children” beneficiaries, he or she may be added through the express power to add beneficiaries (if such a power exists) or through an application to court under the Variation of Trusts Act 1958.

### **Gender recognition**

The Gender Recognition Act 2004 was given Royal Assent on July 1, 2004 and came into force on April 4, 2005. The Gender Recognition Act 2004 provides transsexual people with legal recognition in their acquired gender and enables people over the age of 18 who have changed gender to apply to a Gender Recognition Panel for a gender recognition certificate which, once issued, enables the transsexual's legal gender to become their acquired gender. The transsexual will then have the right to marry, obtain a birth certificate and acquire the benefits from the state in their acquired gender. Transsexuals will, however, retain their original status as either the father or mother of a child (depending on their birth gender).

The effect of the Gender Recognition Act 2004 is that transsexuals are able to use the tax-saving provisions available to married couples and practitioners drafting Wills for transsexual clients will need to bear this in mind. They should also ensure that the transsexual client is aware of the effect of the change to their acquired gender on any existing testamentary arrangements. Existing Wills may be revoked if the transsexual client goes on to marry in their acquired gender. Married clients who are affected by an annulment or divorce following the issue of a gender recognition certificate will need to be reminded that they should review their Wills.

Issues of construction relating to the Gender Recognition Act 2004 tend not to come up often in practice because modern documents tend to be drafted so as not to discriminate between male and female beneficiaries, or include a statement that references to one gender will include the other gender. It is useful, however, for practitioners to be aware of the operation of the Gender Recognition Act 2004.

Wills made before April 4, 2005 are unaffected by the grant of a gender recognition certificate.<sup>13</sup> When a gender recognition certificate is issued to a person, the **\*P.C.B. 64** person's gender becomes for all purposes the acquired gender,<sup>14</sup> and this includes for the purposes of succession so a gender specific gift may be affected for Wills made after that date. Personal representatives are under no duty to enquire whether any of the beneficiaries have been issued with a gender recognition certificate before distributing an estate and will not be liable for doing so unless they have been given notice that a gender recognition certificate has been issued to a beneficiary.<sup>15</sup> Where the devolution of property under a Will made after April 4, 2005 is altered as a result of the issue of a gender recognition certificate, the adversely affected beneficiary may apply to the High Court for an order for provision from the estate.<sup>16</sup>

### **Marriage and civil partnership**

The Civil Partnership Act 2004 came into force on December 5, 2005 and gives same-sex couples

who register their partnership the same rights and responsibilities of marriage which are available to heterosexual couples. The Civil Partnership Act 2004 operates so as to amend other legislation to put civil partners on the same footing as spouses and affects the drafting of Wills in the following way.

### **Wills**

Clients who have formed or are intending to form civil partnerships should be aware of the following potential issues:

- registration of a civil partnership will automatically revoke a person's existing Will unless the Will was made in contemplation of the civil partnership;
- on the dissolution of a civil partnership, the former civil partner will be treated as having died on the date of the dissolution, so both parties will need to review their Wills; and
- legacies under a Will which has been witnessed by the civil partner of a beneficiary will fail, in the same way as if witnessed by a spouse.

Practitioners should also advise clients that civil partners will receive the same entitlement as a spouse on intestacy and civil partners are inserted as potential claimants under the Inheritance (Provision for Family and Dependents) Act 1975 and, as such, should be considered in the class of potential beneficiaries under the Will.

### **\*P.C.B. 65 Spouse**

The Civil Partnership Act 2004 does not deem the term "spouse" to include a civil partner in private documents, so where provisions in Wills relate to marriage they will not include civil partners unless expressly drafted to do so. Practitioners will, by now, be familiar with the need to include civil partners expressly if the testator so wishes. If the testator intends to include civil partnerships registered under foreign law, the term "civil partner" should be defined in the Will in accordance with the Civil Partnership Act 2004 s.212.

The inclusion of "former civil partners" covers the dissolution of civil partnerships and the death of a civil partner and may be desirable to keep the class of beneficiaries wide and give maximum tax planning potential.

Practitioners will also need to take care when drafting rights of occupation to ensure that, if desired, they include the formation of a civil partnership as well as co-habitation and remarriage.

### **Specific categories of beneficiaries**

#### ***Illegitimate children***

Testamentary documents made on or after April 4, 1988 operate so that no distinction is made between legitimate and illegitimate children, and by extension, issue of illegitimate children or other persons tracing their relationship with the testator through an illegitimate relationship.<sup>17</sup>

If the testator wishes to exclude illegitimate children, it would be prudent to define "children" and "remoter issue" as expressly excluding illegitimates.

#### ***Legitimated children***

Children who have been legitimated are entitled to take any interest as if they had been born legitimate.<sup>18</sup> "Children" will therefore include legitimated children unless expressly stated otherwise.

#### ***Adopted children***

A legally adopted child will be treated as a legitimate child of the adopters (if married) or the adopter (if single) from the date of the adoption.<sup>19</sup> The provisions operate so that a gift to "grandchildren" will include the children of an adopted child.

### **\*P.C.B. 66 Step-children**

The term “children” does not include step-children unless the step-child has been adopted by the step-parent or is explicitly included.

### **Survivorship clauses**

Wills of spouses or civil partners often contain survivorship clauses to avoid a situation where (a) the spouses or civil partners die in close succession and both estates have to be administered; and/or (b) there is a double inheritance tax charge; and/or (c) residuary beneficiaries inherit against the wishes of the surviving spouse (which is particularly relevant where the marriage/civil partnership of one or both spouses or civil partners is not their first).

Much has been written recently about whether survivorship clauses have outlived their usefulness with the introduction of the transferable nil-rate band, as their inclusion may give rise to a larger IHT bill than if no survivorship clause was included.<sup>20</sup> If a survivorship clause is included and the spouses or civil partners die within the survivorship period with the first spouse having an estate in excess of the nil-rate band and the second having an estate of less than the nil-rate band, the inclusion of a survivorship clause creates a greater IHT charge because the second spouse's or civil partner's nil-rate band cannot be set against the estate of the first to die. If spouses or civil partners wish to take advantage of the transferable nil-rate band, careful consideration must be given to whether a survivorship clause is included. In cases where the both spouses have estates well in excess of the nil-rate band or their joint estates fall well below the nil-rate band when added together, a survivorship clause may be acceptable. In other situations, practitioners will need to look at the inheritance tax effect of including a survivorship clause. Excluding a survivorship clause removes the risk of the nil-rate band of either spouse being lost, but is not necessarily the best course of action in all cases. Practitioners should consider the assets of the spouses or civil partners, their ages and the succession issues in each case.

### ***The commorientes rule***

Where spouses or civil partners die at the same time in circumstances where it is uncertain which one died first, the commorientes rule applies, for succession law purposes, so that the elder is deemed to die first (provided that that spouse leaves a Will).<sup>21</sup> It is essential to consider the operation of the commorientes rule when a survivorship clause is used as, if it is included, it is important to adapt the clause in the older spouse's or civil partner's Will, so that the younger spouse or **\*P.C.B. 67** civil partner will inherit if he or she survives for the requisite survivorship period *and* where he or she is deemed to survive because of the commorientes rule, as this prevents the commorientes rule being overridden by the survivorship clause. In these circumstances, however, the elder spouse or civil partner will need to be happy with the residue provisions of the younger spouse's or civil partner's Will, because the estates will pass under the younger person's Will.

### **Some conclusions**

Trust and tax practitioners dealing with trusts will need to consider the date of the testator's death and the relevance on the class of beneficiary. It is fair to say that some of the potential hazards described in this article will not be encountered by practitioners regularly. The complicated rules relating to parentage and survivorship clauses do, however, serve to reinforce the importance for practitioners to consider the client's family situation, assets and all the potential issues; the practitioner needs to be aware of these both when taking instructions for a client's Will, and when reviewing existing testamentary documents.

P.C.B. 2010, 1, 59-67

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1. Human Fertilisation and Embryology Act 2008 s.33(1).
  2. Human Fertilisation and Embryology Act 2008 s.35.
  3. Human Fertilisation and Embryology Act 2008 ss.36 & 37.
  4. Human Fertilisation and Embryology Act 1990 s.28(2).
  5. Human Fertilisation and Embryology Act 1990 s.28(3).
  6. Family Law Reform Act 1987 s.27.
  7. Human Fertilisation and Embryology Act 2008 s.38(1).

- [8.](#) Human Fertilisation and Embryology Act 2008 s.33(1).
- [9.](#) Human Fertilisation and Embryology Act 2008 s.42.
- [10.](#) Human Fertilisation and Embryology Act 2008 s.45.
- [11.](#) Human Fertilisation and Embryology Act 2008 s.33(1).
- [12.](#) Human Fertilisation and Embryology Act 2008 s.54.
- [13.](#) Gender Recognition Act 2004 s.15.
- [14.](#) Gender Recognition Act 2004 s.9(1).
- [15.](#) Gender Recognition Act 2004 s.17.
- [16.](#) Gender Recognition Act 2004 s.18.
- [17.](#) Family Law Reform Act 1987 s.1.
- [18.](#) Legitimacy Act 1976 s.5(3).
- [19.](#) Adoption Act 1976 s.39(1).
- [20.](#) See the article by E. Neale "The Transferable Nil-Rate Band, Survivorship Clauses, Commorientes and Related Will Drafting Consideration" [2008] P.C.B. 355.
- [21.](#) Law of Property Act 1925 s.184.

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