Private Client Business

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The purpose of this journal is to draw the attention of all those advising private clients to possible tax planning strategies, tactics, opportunities, traps and relevant legal developments generally. The views offered are intended only to stimulate readers, who will need to evaluate them independently.

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Contributions, case notes and other correspondence should, where possible, be sent to the relevant Correspondent at the address indicated on the Correspondents' page, failing which it should be sent to the General Editor.

Trust

Structuring for Modern Families

Caroline Doyle*

Joshua Ryan**

keywords to be inserted by the indexer

Abstract

Fifty-five years ago trustees of pre-existing settlements and trusts had to be aware that the words "child" and "children" might include illegitimate ones (to use the old-fashioned term then relevant). And in some cases it was enough, say in a new deed of appointment, for the draftsperson to exclude the operation of the Family Law Reform Act 1969 in relation to the construction of such terms. But society has moved on, with civil partnerships, same-sex marriages, surrogate mothers and even "throuples". Statute law has made some provision in some of these contexts,[1] but in many contexts this remains a slow process. The present article contains an important initial exploration of a number of these developments which may affect trustees, individual clients, their partners, their advisers and even HM Revenue and Customs.

Introduction

In the year 2024 the idea of the family being limited to a wife, husband and two point four kids seems dated, as modern families take many forms. This can cause unique issues for estate planning lawyers; some of which have solutions and some of which remain grey areas. In these scenarios it would be prudent to resolve any tax and estate planning issues as and when they arise (if this is at all possible), as otherwise there could be unforeseen tax and succession consequences for families.

"Throuples"

As society progresses, not every family sees the need for monogamy and having multiple partners is becoming more commonplace; both in same sex relationships or in families of differing religions.

In a throuple, three people commit to each other, with no primary couple. This is often more common in same sex partnerships. This can cause unique issues where the parties wish to benefit each other equally but also in a tax efficient manner.

As it cannot be anticipated the order in which people will die, the key to planning for throuples is flexibility.

We have advised all of the partners to put into place flexible estate planning documents, such as discretionary trusts, to allow them to cover for various eventualities. At times, it is advised that it would

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[1] Such as the Surrogacy Arrangements Act 1985 (ch.49).

be sensible tax planning for there to be a marriage between two of the parties to allow for the availability of the spouse exemption.

While no one can predict the future, often it is sensible that the eldest or the person with the largest individual estate should enter into marriage so that their estate can benefit from the spouse exemption. In the (somewhat commonplace) scenario of there being one elder and wealthier party in the throuple, a tax efficient planning method would be for them to marry one of their partners and leave their estate to that partner through a flexible life interest trust, with the other partner as a beneficiary of that trust.

This allows for their estate to pass to one partner free of inheritance tax, with the availability for the other partner to receive assets from the trust through use of the overriding power of appointment. The surviving partner would also then be free to marry the third partner to make use of the spousal exemption from inheritance tax, again through their own planning.

However, as life can be unpredictable it is imperative that the correct advice is sought to create bespoke and workable solutions for the client.

Paternity

Another issue that can arise in polygamy is where there are children and it is not clear who the father is. Often, trusts will leave assets to the issue of the settlor, sometimes with the exclusion of adopted or illegitimate children. Where a family is unwilling to confirm the father of a child, this can lead to ambiguity as to whether the child is a beneficiary of a trust or not. Some jurisdictions have considered this, with jurisdictions in Canada confirming that any child born of the polygamous relationship should be considered valid issue.[2]

In England, where there is not this certainty, the trustees have more powers available to them where the child of the relationship is in a class of discretionary beneficiaries. Equally, flexible powers (such as the power to add beneficiaries) and iron-clad definitions within the trust instrument itself could solve any embarrassment as to having to ask whether a child falls within the class of beneficiaries or not.

Well drafted letters of wishes that set out clear intentions are vital, though, to ensure that trustees understand the settlor's wishes. The trustees can also simply refuse to exercise their power in favour of the child until their parenthood is confirmed.

The position is trickier where there is no element of discretion and all of the issue of the settlor have a defined interest at a certain age. In these circumstances, the trustees could seek protection by requiring indemnities in the event that the child is confirmed as not being issue of the settlor, but enforcement of such an indemnity may be difficult. The trustees therefore risk being in breach of trust either by not distributing to a beneficiary or distributing to someone with no entitlement.

Domicile in same sex relationships

Domicile of origin is a key concept in UK tax legislation that underpins a lot of planning. The English view on domicile can be seen as archaic and sexist, as it derives from the father where the parents are married at the time of birth of the child. The issue therefore arises in same sex couples with differing domiciles.

In a male same-sex couple, from which father does the child derive its domicile? Where there is a genetic connection and a father has parental responsibility for that child, then perhaps it is simpler and the biological father prevails.

The position in adoption is less clear. The general rule in adoption is that domicile is derived from the adoptive father,[3] but what if there are two adoptive fathers? It may be in practice that this is unlikely to

[2] *Re C.C.* 2018 NLSC 71.
[3] Adoption and Children Act 2002 s.67.

be an issue, as it is rare, where there are adoptive fathers of differing domicile, that it could not be argued that the child has formed a domicile of dependency/choice through their parents living together in one country. But with the adhesive nature of domicile of origin in English tax law, this could cause issues where the child then moves at a later date. However, the recently announced abolition of the formerly domiciled resident regime should hopefully mean that there is less impact on the child where UK domicile of origin is in doubt.[4]

The issue is as valid for same-sex mothers. Where a mother is unmarried then the child inherits her domicile at birth. Again, where there is a biological link to one mother then that should prevail, but not in the case of adoption. It is arguable that there could be merit in selecting which parent is listed on the child's adoption certificate to avoid complication on this.

Surrogacy

Under UK law, the surrogate is viewed as the parent of any baby born. This therefore means that at birth, the baby will have the surrogate's domicile (or that of her husband if she is married). Issues could therefore arise if the surrogate has a different domicile to the intended parents. However, if the child is then adopted, it will take its adoptive father's domicile (with the caveat outlined above where there are two adoptive fathers or two adoptive mothers).

One possible unique issue with regards surrogacy and domicile is that, where the intended parents wish to seek a parental order to remove the surrogate's parental rights and instate their own, at least one of the intended parents must be domiciled in the UK.[5] This could cause issues for a transient couple who remain in the UK for a period and wish to have a child by surrogacy during their UK residence.

Another possible issue for surrogacy that is perhaps unique to same sex mothers is that (often commonplace) scenario where one mother carries the child that was created using their partner's gametes. Whether the child is considered to be a child of both parents depends on their relationship, but when the child is considered to be a child of both mothers and the mothers have a different domicile status then their domicile cannot be ascertained easily. The Law Commission has suggested that this area of law be reformed so that a child's domicile being determined by their attachment to a particular jurisdiction and that the child be domiciled in the jurisdiction in which they have the closest connection.[6] This would be a significant change to the law on domicile where the domicile of a child is based on the child's circumstances rather than that of a parent.

The above is just scratching the surface of the issues that can arise for tax and estate planning in modern families. As society continues to progress, it is imperative that these issues are given further consideration by the UK Government to provide clarity to many families.

[4] Finance (No.2) Act 2017 (ch.32), *https://www.gov.uk/government/publications/changes-to-the-taxation-of-non-uk-domiciled-individuals/technical-note-changes-to-the-taxation-of-non-uk-domiciled-individuals*.

[5] Human Fertilisation and Embryology Act 2008 ss.54 and 54A.

[6] Law Commission, *Private International Law: the Law on Domicile* (HMSO, 1987) Scot. Law Com. No.107 (n.39) [4.17].

Succession

The Saga of Re Rea, a Tragedy in Five Acts

Elizabeth Atkinson*

keywords to be inserted by the indexer

Abstract

Contested probate is one of those areas of law in which direct first-hand evidence of important factual situations is often unavailable. Difficult issues such as undue influence have to be decided without evidence from the testator or testatrix and without unbiased evidence from the alleged influencer. Drawing inferences from what evidence is available can sometimes be hazardous, coupled with the intrinsic question whether influence is "undue" or acceptable. The case discussed in this article is a case in point.[1] *In the circumstances the existence of independent witnesses can sometimes prove to be valuable.*

Synopsis

This was a relatively simple probate claim, turning heavily on witness evidence. The tragedy is that it took five substantive proceedings (trial, appeal, appeal, re-trial, appeal) before the matter was finally resolved. The costs involved will significantly have depleted the value of the estate, and the consequential delays have caused an additional five years of contentious litigation between the siblings on each side.

Although there were four heads of claim, in 2024 the Court of Appeal had only to determine the issue of undue influence, and the correct standard of proof in probate claims. That judgment provides guidance on the line between legitimate influence and undue influence. The judgment at the retrial had given detailed reasons—based on the evidence heard—for a finding that the influence was undue. The Court of Appeal then had to re-consider if this finding was justified on the evidence and concluded that it was not. Because of the nature of the first-instance judgment and the questions before the appellate court, these proceedings provide an invaluable source of exposition on where the line might be between undue and legitimate influence.

The proceedings culminated with the Court of Appeal providing an overview of the relevant law, and applying it to the evidence, creating a worked example of undue influence in practice. This is an invaluable source of information to litigators.

Prologue

Anna Rea ("Anna") made a will in 2015 ("the 2015 will"). Under the 2015 will Anna's daughter, Rita Rea, took the majority of the estate. Rita sought a grant of probate in solemn form of that will. Anna's sons Remo, Nino and David defended the claim on the grounds of: (1) testamentary capacity; (2) knowledge

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[1] *Rea v Rea* (No.5) [2024] EWCA Civ 169; on appeal from *Re Rea (Deceased)* [2023] EWHC 1901 (Ch); [2023] W.T.L.R. 1509.

and approval; (3) undue influence; and (4) fraudulent calumny. The brothers counterclaimed for probate of an earlier will made in 1986 ("the 1986 will").

The 1986 will divided Anna's estate between her children in equal shares.

The 2015 will left Anna's house (the main asset, worth about £750,000) to Rita "absolutely as she has taken care of me for all these years", with the remainder of the estate shared out between her children. It also contained a declaration that—

> "… my sons do not help with my care and there has been numerous calls from me but they are not engaging with any help or assistance. My sons have not taken care of me and my daughter Rita Rea has been my sole carer for many years. Hence should any of my sons challenge my estate I wish my executors to defend any such claim as they are not dependent on me and I do not wish for them to share in my estate save what I have stated in this Will."

Rita's caring role and ability to influence Anna were not seriously in dispute. The first and second heads of claim were found in favour of the claimant based upon the evidence of the professional solicitor and doctor who were involved in making the 2015 will. The core question was whether Rita's actions amounted to undue influence (as fraudulent calumny is a subspecies of undue influence).[2]

Act 1—Trial 1 and judgment for the claimant

At a hearing in 2019 the claim was heard.[3] Prior to the trial and again on the first day of it the defendants, representing themselves, applied for an adjournment to obtain fresh representation. In an instance of acute prophetic irony, this was refused on the grounds that "the claim did not involve complex issues".[4]

Evidence was heard from the solicitor who drafted the 2015 will and Dr Qaiyum, Anna's GP, who had conducted a capacity assessment prior to the 2015 will being executed.

The main allegations were that: (1) Anna lacked testamentary capacity; (2) Anna spoke limited English and so lacked knowledge and approval; (3) Rita could be angry, violent and vindictive and had manipulated her mother into creating the 2015 will; and (4) Rita had poisoned Anna's mind with unfair allegations against the defendants.

For a summary of the relevant law on undue influence and fraudulent calumny, the judgment relied on *Re Edwards* that:

> "There is no serious dispute about the law. The approach that I should adopt may be summarised as follows:
>
> (1) In a case of testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;
>
> (2) Whether undue influence has procured the execution of a will is therefore a question of fact;
>
> (3) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. *What must be shown is that the facts are inconsistent with any other hypothesis.* In the modern law this is, perhaps, no more than a reminder of the high burden of proving, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition (emphasis added);
>
> (4) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud;
>
> (5) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future

[2] For fraudulent calumny see also J. Lewison, "Fraudulent calumny—the unanswered questions", (2024) 3 P.C.B. 100.
[3] *Rea v Rea* (No.1) [2019] EWHC 2434 (Ch); [2019] W.T.L.R. 1231; a decision of Deputy Master Arkush.
[4] *Rea* (No.1) [2019] W.T.L.R. 1231 at [3].

destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;

(6) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A 'drip drip' approach may be highly effective in sapping the will;

(7) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is 'fraudulent calumny'. The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside;

(8) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground;

(9) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."[5]

Considering this, and taking the evidence into account, the Deputy Master concluded that—

> "… there is no evidence of Rita exerting any coercion or pressure on Mrs Rea to change her will. The defendants' case is based purely on inference or supposition said to be based on features of her personality. Even if I was inclined to accept the basis of the inference (which I do not), this would still fall far short of discharging the burden of proof which lies on a person who asserts undue influence. Adopting the dicta of Lewison J in *Re Edwards* cited earlier, there is a wholesale lack of evidence which would point to facts consistent with the hypothesis of undue influence. Still less could it be said that the facts are inconsistent with any other hypothesis… . the defendants have failed, by a long way, to establish a case of undue influence."[6]

In his conclusion, the Deputy Master also observed that it was not his task to decide whether the 2015 will was justified or fair, only if it was valid. In a case like this where the parties are all close family members and emotions run high, that observation may prove a useful and pithy soundbite to provide to clients with unmeritorious claims.

The outcome of the 2019 trial was that the 2015 will was valid.

The defendants were litigants in person. This was clearly present in the Deputy Master's mind as he took case management decisions throughout the trial in an attempt to ensure fairness and efficiency. This included controlling certain parts of the evidence.

[5] *Re Edwards (Deceased)* [2007] EWHC 1119 (Ch); [2007] W.T.L.R. 1387 at [47].
[6] *Rea* (No.1) [2019] W.T.L.R. 1231 at [69].

Act 2—The first appeal is dismissed

The defendants sought permission to appeal, which was granted on the sole ground that the "trial was unfair by reason of the way it was conducted by the Judge".[7] That appeal was dismissed in April 2021.[8] It was held that the Deputy Master had made an error in the conduct of the trial by limiting the witness evidence under the mistaken belief that the defendants had already put their case on undue influence and fraudulent calumny to Rita on cross-examination. This mistake was held not to have prejudiced the fairness of the trial.

Act 3—The second appeal is allowed

There was a second appeal in January 2022 on the basis that the Deputy Master's mistake had prejudiced the defendants' case and caused the trial to be unfair. As such, it was remitted for a retrial. Lewison LJ described the outcome as—

> "a tragedy for the whole family. The tangible benefits deriving from the relatively modest estate will have been seriously depleted by the costs of the original trial and the appeal. A further trial may well exhaust them completely."[9]

Act 4—The re-trial: judgment for the defendants

The matter then proceeded to a retrial in July 2023. At that retrial, all four original heads of claim were pursued again. The judge held that the 2015 will was invalid.[10]

On undue influence, the judge cited the same passage from *Re Edwards* as appears above. In addition, he referred to *Schrader v Schrader* and *Schomberg v Taylor*,[11] citing passages which concerned the subtler aspects of undue influence, and the consequential need (on occasion) to rely on circumstantial evidence and the responses of the beneficiaries to discovering the terms of the new will.

The judge was satisfied that "the defendants have established undue influence to the required standard in the present case",[12] that standard being that "the facts are inconsistent with any other hypothesis".[13]

The eight main factors which led to this conclusion are summarised as follows:

(1) Anna was frail and vulnerable being 86, in a wheelchair and requiring hearing aids. On the other hand, the judge described what he considered to be "Rita's argumentative and forceful personality, and her forceful physical presence". It is not clear what was meant by the latter point.

(2) Anna was dependant upon Rita, who was her primary (if not sole) carer. He described his finding that "Anna was in thrall to her only daughter, and carer" as being evidence of undue influence.

(3) His finding of unreliability in relation to Rita's evidence on being told about Anna's intention to change the 1986 will. That evidence was that Anna had raised the subject herself after reading a relevant newspaper article.

[7] *Rea v Rea* (No.2) [2021] EWHC 893 (Ch) at [1].
[8] *Rea* (No.2) [2021] EWHC 893 (Ch), a decision of Adam Johnson J.
[9] *Rea v Rea* (No.3) [2022] EWCA Civ 195 at [92].
[10] *Re Rea (Deceased)* [2023] W.T.L.R. 1509, a decision of HH Judge David Hodge KC.
[11] *Schrader v Schrader* [2013] EWHC 466 (Ch); [2013] W.T.L.R. 701 at [96]–[98]; *Schomberg v Taylor* [2013] EWHC 2269 (Ch); [2013] W.T.L.R. 1413.
[12] *Re Rea (Deceased)* [2023] W.T.L.R. 1509 at [124].
[13] *Re Rea (Deceased)* [2023] W.T.L.R. 1509 at [123].

(4) The timing of the 2015 will, which was made shortly after two brothers ceased providing Anna with the little care that they did and thereby failing to assist Rita in her caring responsibilities.

(5) Rita's role in setting up the practical arrangements for the 2015 will to be made, such as making the appointments with the solicitor.

(6) The facts that the terms of the 2015 will were preferential to Rita and marked a significant change from the will which had stood for 30 years, and his finding that the language of the declaration was more likely to have originated from Rita than Anna.

(7) That there was no evidence Anna fully understood Rita's financial situation and may have thought Rita was less well-off than she really was. The judge was therefore concerned about the motivations for the devise of the property. This appears in some conflict with the judge's next statement that Rita owned no property of her own and so she had "good reason to wish to secure the ownership of [the property] to ensure that she would retain a roof over her head"—a concern which might reasonably be shared by one's mother.

(8) That neither Rita nor Anna disclosed the existence or terms of the 2015 will to any other parties during Anna's life. The "only conceivable explanation for the omission" was apparently that Rita wated to avoid the changes from the 1986 will becoming known until after Mrs Rea's death "because that would make it more difficult for [the defendants] to challenge the 2015 will". Here too the judge was influenced in his finding of undue influence by the "shock and surprise" of the defendants and others when they learned the terms of the 2015 will.

The judge therefore concluded that the case of undue influence by coercion (not fraudulent calumny) was made out:

> "… these factors all provide solid, and reliable, evidence that the effect of Rita's coercion was that Anna made a will that did not reflect her true testamentary intentions, which Rita had overborne."[14]

Act 5—The re-trial is appealed: judgment for the claimant

The finale. To probate lawyers this is the most exciting Act, as the Court of Appeal considers the law of undue influence and its application (and, consequently, its misapplication).

Rita appealed the decision of Judge Hodge on two bases: (1) the particulars did not allow for a finding of undue influence and so the judge should have confined himself to the particulars—the "pleadings issue"; and (2) regardless, the judge was simply wrong to find undue influence—the "substantive issue". The appeal was heard in February 2024.[15]

As a result, the Court of Appeal considered the principles of undue influence. Only the substantive issue was considered. Judge Hodge had been—

> "… satisfied that the facts are consistent only with Rita having procured the making and execution of the 2015 will by the exercise of undue influence over her mother, which overpowered Anna's volition without convincing her judgment."[16]

He had said that his eight identified factors

> "[w]hen viewed in combination … all point inexorably to the conclusion that Rita had pressured Anna into making a new will, leaving the house to Rita, not by convincing her mother that this was

[14] *Re Rea (Deceased)* [2023] W.T.L.R. 1509 at [134].
[15] *Rea v Rea* (No.5) [2024] EWCA Civ 169.
[16] *Re Rea (Deceased)* [2023] W.T.L.R. 1509 at [124].

> the right thing to do, but by applying some form of improper influence over her to procure the testamentary gift of the house in her favour, cutting out the sons who had stood to share equally in the estate for almost 30 years"[17]

and that the factors—

> "all provide solid, and reliable, evidence that the effect of Rita's coercion was that Anna made a will that did not reflect her true testamentary intentions, which Rita had overborne."[18]

Rita's appeal caused the Court of Appeal to consider whether it should interfere with a trial judge's finding of fact and re-make the decision. It did both of those things.

Newey LJ gave the leading judgment, with which Moylan and Arnold LJJ agreed. This included a survey of the law. In one of the most significant parts of that survey Newey LJ addressed the standard of proof and the oft-overstated principle that the circumstances must be inconsistent with an hypothesis other than undue influence.[19]

Newey LJ cited with approval the tempered re-statement of that principle by Morgan J in *Cowderoy v Cranfield* that—

> "… where I have considerable evidence as to the circumstances in which the disputed will was prepared and executed, I think that it is more appropriate for me simply to ask whether the party asserting undue influence has satisfied me to the requisite standard."[20]

He then went on to cite *Theobald on Wills*, which again re-states that "the true test is whether undue influence is the most likely hypothesis, having regard to the inherent unlikelihood of someone practising undue influence on a testator".[21]

Newey LJ's conclusion was to—

> "… accept that undue influence can be proved without demonstrating that the circumstances are necessarily inconsistent with any alternative hypothesis. On the other hand, the circumstances must be such that undue influence is more probable than any other hypothesis. If another possibility is just as likely, undue influence will not have been established. When making that assessment, moreover, it may well be appropriate to proceed on the basis that undue influence is inherently improbable."[22]

He then went on to apply this principle to the evidence and the eight factors relied upon by the trial judge and reached a different conclusion.

The eight factors identified by Judge Hodge:

(1) (a) Frailty and vulnerability. The Court of Appeal was not satisfied that physical vulnerability implied suggestibility, and that any inference might stand to be rebutted by a finding of testamentary capacity.

(b) Rita's "argumentative and forceful personality" was found obviously not "consistent only with her having coerced her mother".[23] It is unsurprising that the trial judge's suggestion that Rita's physical appearance made her more likely to practise undue influence was given little consideration. This author notes that in Act 1, the first trial, the Deputy Master found that "the defendants' case is based purely on inference

[17] *Re Rea (Deceased)* [2023] W.T.L.R. 1509 at [133].
[18] *Re Rea (Deceased)* [2023] W.T.L.R. 1509 at [134].
[19] *Rea* (No.5) [2024] EWCA Civ 169 at [30]–[32].
[20] *Cowderoy v Cranfield (Costs)* [2011] EWHC 2628 (Ch); [2011] W.T.L.R. 1741.
[21] A. Learmonth et al. *Theobald on Wills*,19th edn (London: Sweet & Maxwell, 2021), para.4-060.
[22] *Rea* (No.5) [2024] EWCA Civ 169 at [32].
[23] *Rea* (No.5) [2024] EWCA Civ 169 at [46].

or supposition said to be based on features of [Rita's] personality".[24] It appears that at the second trial the judge may have drawn inferences from her physical attributes as well.

(2) The Court of Appeal rejected the suggestion that Anna's dependency on Rita was evidence of undue influence, although it accepted that it may have put Rita in a better position to be able to practise it. The Court of Appeal also thought that Rita's unwavering support of her mother might plausibly cause Anna to want to amend her will in favour of Rita aside from any undue influence.

The conclusion that Anna was "in thrall" to Rita was similarly rejected as being equally supportive of Anna's independent wish to make provision for Rita. The Court of Appeal put more weight on the evidence of the solicitor who was present and unconcerned by Anna's "thrall" at the relevant time, than the judge's conclusion.

(3) Newey LJ found that an illogical leap was made when considering the third factor—that Rita's inconsistent evidence on how she was told about the new will led to a conclusion that Rita must have been putting undue pressure on Mrs Rea. The Court of Appeal was more sympathetic to the notion that Rita might be untruthful simply because her lawful encouragement of Anna to make a new will would be unattractive to her case, and that it is not evidence of undue influence.

(4) Fourth, the Court of Appeal gave no weight to the timing of the instructions for the 2015 will. The sons' actions may have legitimately contributed to the reasons for making a new will and there was nothing to consider it was evidence of undue influence.

(5) Fifthly and importantly, Newey LJ thought that the fact that Rita had arranged the meeting with the solicitor and had been present at the meeting (at Anna's request) was not evidence in support of a finding of undue influence. Similar circumstances happen frequently in practice, particularly as elderly or vulnerable people wish those who care for them to be physically nearby and regularly rely on their carers for practical arrangements. Newey LJ relied in part on the fact that Rita was not present at the meeting where the 2015 will was revised and executed.

(6) The Court of Appeal found that with regard to the sixth factor, the wording used in clause 11 of the 2015 will (in particular, the word "abandoned" was alleged to have come from Rita, not Anna), the point was never put to Rita to address, and so no evidence was heard from her on it. The evidence from the solicitor who drafted the clause did not support the judge's findings on the provenance of the words used.

(7) Again, the seventh finding was rejected on similar grounds as above; that the evidence was equally consistent with Anna's voluntary desire to provide for Rita.

(8) The final factual finding on which the trial judge relied was that Rita and Anna did not discuss the 2015 will with the defendants. Newey LJ held that a desire not to have it known until after Anna's death because that would be more difficult to challenge would be consistent with Rita having *persuaded*, but not *coerced* Anna.

In addition to rejecting the eight factors identified by Judge Hodge, Newey LJ was not satisfied that he had given sufficient account of the evidence of the witnesses who were not parties, two of whom were independent professionals with relevant expertise and all of whom he found to be reliable.

Taking these into account Newey LJ concluded that—

> "… the Judge was mistaken in finding there to have been undue influence. I do not think the evidence entitled him to arrive at that conclusion. Undue influence in this context connotes coercion such as

[24] *Rea* (No.1) [2019] W.T.L.R. 1231 at [69].

> to 'overpower the volition without convincing the judgment,' where the testator's volition is 'overborne and subjected to the domination of another' and the testator would say if he could speak his wishes, 'this is not my wish, but I must do it.' This, to my mind, is a case in which it is appropriate to proceed on the basis that such conduct is inherently unlikely."[25]

He continued to say that there was no direct evidence of coercion and that the evidence did not give rise to an inference of it. He then stated that—

> "For coercion to be proved, it had to be shown to be more probable than any other possibility. I do not think there is any question of coercion having been the most probable possibility here… . the Judge needed to consider whether the circumstances were as consistent with Anna deciding to make a new will either entirely of her own accord or after being encouraged to do so by Rita. Undue influence was, to my mind, clearly no more likely than at least the latter of these hypotheses … Apart from anything else, the aspects of Rita's evidence to which the Judge drew attention were consistent with the (inherently more probable) possibility of Rita having merely sought to persuade her mother to make the 2015 will."[26]

Conclusion

When considering the test for undue influence, the Court of Appeal appears to broaden it, by loosening the statement of principle concerning the "alternative hypothesis". That would have the effect of increasing the availability of claims. However, the Court then went on in practice to show how difficult it is to establish that undue influence is more likely than not, particularly where there is a case for legitimate persuasion. The nature of this appeal means that practitioners now have a worked example of how evidence may be weighed and interpreted both with an initial view from the High Court and an explanation from the Court of Appeal of why that view was wrong. *Re Rea* (Act 5) is instructive and will be an invaluable source to litigators when advising their clients of the merits of possible claims because of its granular focus on the evidence.

That said, this undulating case underscores how challenging it can be to establish undue influence, and how subjective the findings can be.

[25] *Rea* (No.5) [2024] EWCA Civ 169 at [57].
[26] *Rea* (No.5) [2024] EWCA Civ 169 at [57].

Fraudulent Calumny—The Unanswered Questions

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Introduction

Over the past ten years or so, the plea of fraudulent calumny has emerged as a mainstay of contentious probate claims, almost on a par with testamentary capacity, want of knowledge and approval and undue influence. But for all its popularity, the precise components of fraudulent calumny, its relationship with other kinds of fraud and the remedies available have yet to be worked out.

This article started as an attempt to fill in some of the gaps, but in fact concludes that fraudulent calumny entered the legal lexicon as a construct of textbook writers and is only an example of a more general plea of fraud.

The modern origin

Fraudulent calumny began its recent rise in *Edwards*,[1] which offered the following statement of the law:

> "There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is 'fraudulent calumny'. The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside."
>
> "The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone …"[2]

The apparent gaps in that formulation are these.

(1) The name of the plea, and the way it was cast in *Edwards*, make it clear that the testator must have been induced to form a negative impression of the calumniated beneficiary. But what if the testator has been led to form an incorrect impression that is neutral or positive? For example, a testator might be tricked into thinking that their intended beneficiary is extremely wealthy, and so decide to leave their estate to someone else.

(2) What does it mean to be a "natural object of the testator's bounty"? The test could be an objective one—certain persons are always natural, like spouses and children—or subjective, so the circumstances are key.

(3) Must the testator be induced to believe something false, or is it enough that a misapprehension is dishonestly left uncorrected?

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[1] *Re Edwards (Deceased)* [2007] EWHC 1119 (Ch); [2007] W.T.L.R. 1387 ("*Edwards*"), a decision of Lewison J.

[2] *Edwards* [2007] W.T.L.R. 1387 at [47(vii), (viii)].

(4) Is it necessary to show that the calumniator's intention was to interfere with the will, or is it enough to show that the will was the result of the false statement?

(5) Does fraudulent calumny invalidate the whole will or only part of it, and are there any other available remedies?

The earlier cases

The elements of the plea of fraudulent calumny, as expressed in *Edwards*, are drawn from two cases: *Allen v M'Pherson*[3] and *Boyse v Rossborough*,[4] with most taken from the latter.

The case in *Allen* was that the testator's son and daughter had "concocted a report containing various false representations of the appellant's character and manner of life", that they had read it to him and thus induced him to execute a codicil substantially reducing the appellant's entitlement under a will and previous codicils. The appellant was a great nephew of the testator.

Lord Lyndhurst gave the first speech, and it is an extract from it that provides the root of fraudulent calumny as it is now understood:

> "There cannot be a stronger instance of fraud than a false representation respecting the character of an individual to a weak old man, for the purpose of inducing him to revoke a bequest made in favour of the person so calumniated."[5]

That statement was based, at least in part, on *Butterfield v Scawen*, an unreported case from 1775, in which it had been held as follows.

> "If it should appear, as in the case stated by your Lordships, that an old and infirm testator who had bequeathed a legacy to A.B., had been induced by false and fraudulent representations with reference to the conduct of A.B., made to him for the purpose by C.D., to make a subsequent codicil revoking that bequest, and substituting for it a much smaller legacy, the effect of which would be to give a larger share of the residue to C.D. than he otherwise would take, I conceive that the Ecclesiastical Court would not, under such circumstances, grant probate of such revoking codicil, provided it should be clearly established in point of evidence that such act and intention were produced by such false and fraudulent representations."[6]

The content of fraudulent calumny was not in issue in *Allen*. Rather, the appeal concerned the jurisdictions of the Ecclesiastical Courts, which admitted wills of personalty to probate, and the Court of Chancery, which could declare the existence of trusts and grant equitable remedies. This article returns to those matters later. For now, it is enough to note that Lord Lyndhurst was referring to the facts alleged in the case—which had to be accepted as true, because the jurisdiction point was addressed on demurrer—and was describing them only as an example of fraud.

In *Boyse*, the allegations were fourfold. First, it was said that the testator lacked testamentary capacity. Second, his wife was accused of having procured him to execute a will by trickery. Third, she was accused of having estranged the testator from his family. Finally, it was alleged that the testator had been coerced into executing his will. The key part of Lord Cranworth LC's speech is this:

> "If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may, perhaps, be equivalent to positive fraud, and may render

[3] *Allen v M'Pherson* (1847) 1 H.L. Cas. 191; 9 E.R. 727 ("*Allen*").
[4] *Boyse v Rossborough* (1857) 6 H.L. Cas. 2; 11 E.R. 1192 ("*Boyse*").
[5] *Allen* (1847) 9 E.R. 727, 735.
[6] *Butterworth v Scawen*, unreported, 1775, cited in *Allen* (1847) 9 E.R. 727, 735.

> invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature."[7]

Later on in his speech, the Lord Chancellor said:

> "The most I can find, if indeed that can be found, is evidence to show that the act done was consistent with the hypothesis of undue influence; that the instrument, though apparently the expression of his genuine will, might in truth have been executed only in compliance with the threats or commences of his wife, *or that he had been led to execute it by unfounded prejudices artfully instilled into or cherished in his mind by his wife against those who would otherwise have been the probable objects of his bounty*."[8] (Emphasis added)

Elsewhere, the Lord Chancellor mentioned "fraud" and "fraudulent misrepresentations".[9]

The textbooks

The term "fraudulent calumny" does not appear in the earlier cases and seems to have been coined in what is now *Williams, Mortimer & Sunnucks on Executors, Administrators and Probate*.

The second edition of *Mortimer on the Law and Practice of the Probate Division of the High Court of Justice* includes a section on wills obtained by fraud.[10] The text quotes Lord Lyndhurst's statement, with a citation to *Allen*, but does not seek to identify fraudulent calumny as a plea separate from fraud. The same passage from *Allen* is quoted in the then-newly merged *Williams, Mortimer & Sunnucks*, in the Fraud section, under the heading "Fraudulent calumniation".[11] It was only in the sixteenth edition that the term "fraudulent calumny" appeared for the first time.[12] Other textbooks of the time do not use the term or seek to distinguish fraudulent calumny from fraud more generally.

After *Edwards*

Several cases have followed *Edwards*, of which only two have considered the legal test in more detail.

The first is *Kunicki v Hayward*.[13] There Mr Recorder Klein broke down the plea into these elements, substituting the names of the parties for their roles:

- that [the calumniator] made a false representation;
- to the testator;
- about [a potential beneficiary's] character;
- for the purpose of inducing [the testator] to alter [their] testamentary dispositions;
- that [the calumniator] made such a representation knowing it to be untrue or being reckless as to its truth; and
- that the [will] was made only because of the fraudulent calumny.

[7] *Boyse* (1857) 11 E.R. 1192, 1211.
[8] *Boyse* (1857) 11 E.R. 1192, 1212.
[9] *Boyse* (1857) 11 E.R. 1192, 1209.
[10] C. Mortimer (ed.) *Mortimer on the Law and Practice of the Probate Division of the High Court of Justice*, 2nd edn (London: Sweet & Maxwell, Stevens & Sons, 1927), p.*.
[11] J. H. G. Sunnucks (ed.) *Williams, Mortimer & Sunnucks on Executors, Administrators and Probate*, 15th edn (London: Stevens & Sons, 1970) p.*.
[12] J. H. G. Sunnucks, J. Ross Martyn and K. Garnett (eds) *Williams, Mortimer & Sunnucks on Executors, Administrators and Probate*, 16th edn (London: Stevens & Sons, 1982), p.*.
[13] *Kunicki v Hayward* [2016] EWHC 3199 (Ch); [2017] 4 W.L.R. 32.

Two of those points were considered subsequently in *Christodoulides v Marcou*[14] on an application for permission to appeal heard by Morgan J. Those were the purpose that had to be proved and the causation element.

The appellant first contended that it had to be shown that the calumniator's purpose in making false representations was to cause the testator to alter their testamentary intentions. The appellant cited *Allen* and *Boyse* in support of that submission. As to *Allen*, Morgan J noted that it was arguable that Lord Lyndhurst's statement referred only to the case before the House, but also accepted that *Butterfield v Scawen* included the purpose of the representations among its ingredients. Turning next to *Boyse*, Morgan J identified two statements of Lord Cranworth LC that pointed to a purpose focused on changing the testator's testamentary intentions.

Ultimately, Morgan J left the purpose point open because it had not been taken at trial. Permission to appeal on that ground was refused.

The second point on which the appellant sought to rely was on causation: did the testator form their intentions *only* because of the fraudulent misrepresentations? There, Morgan J was definitive: it was enough that the calumny was proved on the balance of probabilities to have caused or induced the change. He held that—

> "… the use of the word 'only' should not be understood as requiring a finding that there must have been no other reason operating in conjunction with the effect of the fraud for the testator to change his or her intentions."[15]

There was no real prospect of success on that ground, because of the findings of fact at first instance.

Kunicki v Hayward has since been followed,[16] including on those two points, no doubt because *Christodoulides* was a permission to appeal application, and thus not citable as authority.

Breaking down the elements

Conduct and character

The history of fraudulent calumny shows that it was not a plea in itself separate from fraud generally. Lord Lyndhurst in *Allen* introduced his own statement as an "instance" of fraud, which sets it in the wider context of fraud more generally. Likewise, the extract from *Butterfield v Scawen* appears to have responded to the case stated, rather than laying down a proposition of law: fraudulent calumny is unlikely to be confined to old and infirm testators, for example, nor only to codicils. False and fraudulent representations must lie at the heart of it, but the judge in *Butterfield* did not go further than to refer to the "conduct" of the subject of the false representations. The conduct in that case had been discreditable—an alleged attempt to poison the testator—but the judge did not elaborate on the nature of the conduct required to be shown.

In *Boyse* the Lord Chancellor referred to "prejudices" and "impressions … to [the victims'] disadvantage", which is more clearly a reference to a negative false belief.[17] Again, though, Lord Cranworth appears to have been dealing with the facts of the case before him and not laying down wider principles of law.

Since the cases were decided on their own facts, it is hard to see that the false representation must be a pejorative one as a general rule. Other cases have recognised that a legacy to a supposed spouse may fail where the character of spouse has been falsely assumed. Thus in *Kennell v Abbott*[18] a woman had left a legacy to a man she thought was her husband, when in fact the supposed marriage was bigamous. That

[14] *Christodoulides v Marcou* [2017] EWHC 2632 (Ch); [2020] W.T.L.R. 883.
[15] *Christodoulides* [2020] W.T.L.R. 883 at [59].
[16] *St Clair v King* [2022] EWHC 40 (Ch); [2022] W.T.L.R. 703; *Re Dale (Deceased)* [2022] EWHC 2462 (Ch).
[17] *Boyse* (1857) 11 E.R. 1192, 1211.
[18] *Kennell v Abbott* (1799) 4 Ves. Jr. 802; 31 E.R. 416.

case was followed in *Posner*,[19] where it was the putative wife who was alleged to have contracted a bigamous marriage. In each case it was the fraud rather than any negative connotation that undermined the gift.

Thus, in this author's view it is sufficient that a false representation is made. It does not have to be a negative statement about the subject's conduct or character or lead to a "poisoning of the mind" in the sense of generating ill-will. In the example given at the beginning of this article, A tells T that B (who would otherwise benefit) is already very wealthy. It is suggested that, if that representation were false, it would provide the basis to contest a will that was made as a result, even though being wealthy is not normally a negative.

Natural objects

The element of the test concerning a "natural beneficiary", as in the formulation in *Edwards*, is drawn from Lord Cranworth's speech in *Boyse*. It was not part of the other early cases. Properly understood in context, the Lord Chancellor was not stating a general rule, but evaluating the evidence.

In order to test whether a fraudulent statement had had any effect, one must look at the counterfactual—what would have happened in the absence of the statement? In some cases, that may be a simple question of looking at a prior will or codicil and inferring that the prior provision would have been left unchanged. In other cases it may be possible to identify an intention to benefit a particular person, perhaps from instructions given to a solicitor, that later changed so as not to benefit them. But in some cases, where there were particular persons who might have been expected to benefit, but who did not, that expectation may inform the court's fact-finding about whether a fraud has been practised.

If that is right, then no element requires a person to have been a natural object; at most, a given person's circumstances and relationship to the testator might be information for the court to consider.

Non-correction of false impression

The seed for this potential ground comes from *Boyse*, where the wife was alleged to have kept the testator from seeing his relatives and so deprived him of the opportunity to correct his false impression. Lord Cranworth held that those facts might amount to positive fraud. Could that holding apply more widely?

The starting point here is that the principles under consideration appear to have been common law ones: the Lord Chancellor was examining whether a will might be invalid at that point, rather than whether a trust might have arisen. At common law, as matters currently stand, mere non-disclosure is not usually enough to set up a fraud, whether in the tort of deceit or in seeking to avoid a contract for misrepresentation.

Thus, in the classic case of *Smith v Hughes*,[20] Cockburn CJ held that "the passive acquiescence of the seller in the self-deception of the buyer" would not entitle the latter to avoid the contract.[21] Blackburn J held similarly, "whatever may be the case in a court of morals".[22] Each referred to exceptions that still hold true today: where there is a legal obligation to disclose, a failure to do so may ground an action; and where the mistake is induced by the act of the non-mistaken party, there may also be an obligation to disclose.

In addition to those two exceptions, non-disclosure may amount to fraud where the parties are in a fiduciary relationship. So, in *Conlon v Simms*[23] there was a duty of disclosure to a fellow-partner arising out of the fiduciary relationship between partners.

[19] *In the Estate of Posner* [1953] P. 277; [1953] 1 All E.R. 1123.
[20] *Smith v Hughes* (1870–71) L.R. 6 Q.B. 597; (1871) 19 W.R. 1059.
[21] *Smith* (1870–71) L.R. 6 Q.B. 597, 603.
[22] *Smith* (1870–71) L.R. 6 Q.B. 597, 607.
[23] *Conlon v Simms* [2006] EWHC 401 (Ch); [2006] 2 All E.R. 1024.

Going back to *Boyse*, Lord Cranworth's statement recognised that the allegation included the suggestion that wife had raised the prejudices in the first place. Any non-disclosure that followed would be coupled with the initial falsehood, and so contribute to a finding of fraud.

Another potential avenue, hinted at by the fact that it was a wife's conduct at issue in the case, is that it might be possible to draw on some of the undue influence and abuse of confidence cases. That raises the question about the availability of equitable remedies, which is dealt with below.

The fraudster's purpose

In *Allen* Lord Lyndhurst addressed the necessary purpose: "inducing him to revoke a bequest".[24] Purpose was not covered in *Edwards*, but Lord Lyndhurst's statement may have led to the narrow expression of the test in *Kunicki* along similar lines: for the purpose of inducing the testator to alter their testamentary dispositions.

The question here is whether the purpose is any wider than that. For example, a fraudster may falsely blacken the victim's name to dissuade the testator from making a lifetime gift. If the testator then makes a codicil excluding the victim from benefit under an existing will, is the codicil invalid?

In *Peek v Gurney*, decided 30 years after *Allen*, Lord Cairns tested the causation aspect of deceit and gave this example:

> "I put the case of a person having built a house and desiring to sell it. He comes to me and wishes me to purchase it; he describes it as a highly advantageous purchase, and makes statements of fact to me with regard to the house which are untrue and are misrepresentations; but I decline to purchase, and our overtures come to an end. He subsequently sells it to some other person, upon what terms I know not. That other person completes the purchase, and that other person, desiring to raise money on mortgage, applies to me to lend him money. I lend him money upon a mortgage of the house. The facts stated to me originally turn out to be untrue, and are so material as that the house, not being as represented, becomes comparatively worthless. I then apply to the original vendor, remind him of what he told me, and complain to him that my money lent upon mortgage has been lost, and I commence an action against him for damages to recover my loss. I ask, could such an action be maintained? I know of no authority for it, and I am of opinion that an action of that kind would not lie."[25]

Thus, at the time *Allen* was decided, not every consequence of a fraud was actionable, even though caused by the falsehood, if the consequence was outside the fraudster's purpose. *Peek v Gurney* was followed in *Bradford BS v Borders*, Lord Maugham holding that the representation "must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him".[26]

But those cases were distinguished by the Court of Appeal in *Goose v Wilson Sandford & Co*.[27] There, it was held that the apparent restriction applied only where the fraudulent misrepresentation was made to someone other than the person deceived. In a case of fraudulent calumny, the testator is the person deceived. Normally, it is enough that the representor should intend to deceive the representee with the intent that the statement be acted on by them. Fraudulent calumny should be no different.

If—as this author suggests—fraudulent calumny is to be properly understood only as a species of fraud operating on common law principles, then the requirements should evolve with the common law. Thus, it is too restrictive to say that the fraudster's intent should be directed at the testamentary dispositions; it

[24] *Allen* (1847) 9 E.R. 727, 735.
[25] *Peek v Gurney* (1873) L.R. 6 H.L. 377, 411–412.
[26] *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All E.R. 205.
[27] *Goose v Wilson Sandford & Co* [2001] Lloyd's Rep. P.N. 189.

should be enough that the fraudster intended the testator to act on the representations. That may often involve a testamentary instrument, but that may not be true in every case.

Causation the only test?

The final element set out in *Kunicki* was that the testamentary instrument was made *only* because of the fraudulent calumny. As Morgan J explained in *Christodoulides*, that requirement appears to stem from an interpretation of Lord Cranworth LC's speech in *Boyse*, holding that it was insufficient to show that the circumstances of execution were consistent with undue influence; it had to be shown that they were inconsistent with a contrary hypothesis.

The Court of Appeal, in the context of undue influence, has watered down that test, affirming that proof is only on the balance of probabilities. So, even if it applies, it is not as stringent as stated in *Kunicki*. In *Rea v Rea* Newey LJ held:

> "I would accept that undue influence can be proved without demonstrating that the circumstances are necessarily inconsistent with any alternative hypothesis. On the other hand, the circumstances must be such that undue influence is more probable than any other hypothesis. If another possibility is just as likely, undue influence will not have been established. When making that assessment, moreover, it may well be appropriate to proceed on the basis that undue influence is inherently improbable."[28]

Returning to causation, the common law has long recognised that a fraudulent misstatement need not be the sole cause of loss in a claim in deceit: "It is not necessary to shew that the misstatement was the sole cause of his acting as he did".[29] The principle was approved more recently by the House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corp*.[30] There is no reason to impose a more exacting standard in fraudulent calumny cases.

Remedies

The remedy when other pleas are upheld tends to be to refuse probate of the whole will or codicil affected. Thus, if a testator lacks mental capacity, the entire will is invalid; the court does not go through it to identify which parts may have been good and which bad. But that is not always so. In *Rhodes v Rhodes*[31] it was recognised that if part of a will had been introduced by fraud or, perhaps, inadvertence, probate could be refused of that part. And as Lord Neuberger noted in *Marley v Rawlings*,[32] refusal of probate could be used to rectify wills before the official introduction of rectification by the Administration of Justice Act 1982.

So much was recognised in *Allen*, which largely concerned the interface between common law remedies available in courts of probate (then the Ecclesiastical Courts for movables and the King's or Queen's Bench for immovables) and the equitable remedies available in the Court of Chancery. In *Allen*, the whole appeal seems to have sprouted from a misapprehension about the Ecclesiastical Court's jurisdiction, which for procedural reasons could not be challenged.

The proceedings in Chancery started with a bill, which alleged that—

[28] *Rea v Rea* [2024] EWCA Civ 169 at [32].
[29] *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459 per Cotton LJ.
[30] *Standard Chartered Bank v Pakistan National Shipping Corp* (No.2) [2003] 1 A.C. 959; [2002] 3 W.L.R. 1547.
[31] *Rhodes v Rhodes* (1882) 7 App. Cas. 192.
[32] *Marley v Rawlings* [2014] UKSC 2; [2015] A.C. 129.

> "… the appellant was confined in the Prerogative Court to grounds of objection which affected the codicil as an entire instrument, and was not permitted to go into the case stated in the bill, or into any other case solely relating to the parts of the codicil which affected only the appellant."[33]

The response to the bill was a demurrer. Much like a modern-day application for summary judgment or striking-out, on a demurrer it had to be assumed that the facts stated in the bill were correct; only principles of law could be argued. So the courts had to assume that the Ecclesiastical Court had indeed ruled as alleged.

In fact, as Lord Lyndhurst held, it was—

> "… perfectly clear that the Ecclesiastical Court may admit a part of an instrument to probate and refuse it as to the rest … It is, in fact, the constant practice of the Court … The matter should have been set right on appeal."[34]

Even so, he acknowledged that the matter was before the House of Lords—where appeals from Chancery ultimately lay—and not the Privy Council, the apex of ecclesiastical appeals.

The interaction with equitable remedies was the subject of a 3:2 split. Lords Lyndhurst, Brougham and Campbell were in the majority. They held broadly that where there was a remedy available in probate, there was no room for an equitable remedy in Chancery. Thus, Lord Lyndhurst held that the Court of Chancery would only interfere where the Court of Probate could "afford no adequate or proper remedy", to allow otherwise would be to set up the Court of Chancery as an appellate court from the Ecclesiastical Courts.[35]

Lord Brougham was more explicit:

> "How, in the case of a great fraud being practised by one party against another, the effect of which may be to swell the residue, is the Court of Chancery ever to get at that fraud, if probate of the instrument has been refused by the Ecclesiastical Court? That is very true, but in all such cases, if the judge of the Court of Probate sees reason to suspect that there ought to be relief in respect of fraud, a judicious mind would naturally lean towards granting probate, in order that case might come before a Court of Equity, whereas it never could if the probate were refused. I should say that if the Court of Probate has not the power of giving relief, the judge there is bound to grant probate, in order that those who have the power may be able to exercise it, and grant redress."[36]

Lord Campbell held similarly:

> "… I take this distinction; where the Ecclesiastical Court cannot do justice by the powers belonging to it, probate must be granted; it is not a Court of construction, and it must confine itself within its own limits; in certain cases it must grant probate, and refer the parties for justice to a Court of Equity; but if the Ecclesiastical Court in any particular case can do ample justice by granting or refusing a probate, then after the decree of the Ecclesiastical Court there is no remedy in the Court of Chancery."[37]

Nowadays, law and equity have been fused and contentious probate business has been assigned to the Chancery Division. Even so, the underlying principle appears sound: if the court can achieve justice by refusing probate, wholly or partly, then that is all that need be done. But if that is insufficient, then equity may intervene.

In some jurisdictions in the US, courts have recognised a tort of "interference with an expectation of inheritance". In California, on the other hand, such a tort has been rejected following similar reasoning

[33] *Allen* (1847) 9 E.R. 727, 736.
[34] *Allen* (1847) 9 E.R. 727, 736.
[35] *Allen* (1847) 9 E.R. 727, 737.
[36] *Allen* (1847) 9 E.R. 727, 742.
[37] *Allen* (1847) 9 E.R. 727, 747.

to that in *Allen*. In *Munn v Briggs* the California Court of Appeal upheld a demurrer to an action in tort when the plaintiff had an adequate remedy in probate.[38]

Conclusion

Understood in their proper context, the pre-*Edwards* cases were dealing with individual frauds. The nature of will-making means that a particular mode of fraud—making false statements about a potential beneficiary—has happened often enough to have come before the court several times. Those cases have since been drawn together and treated as representing a free-standing principle of law.

In fact, fraudulent calumny is not a free-standing plea, but part of a more general plea of fraud. Fraud here is to be understood as following common law principles, as those principles have evolved, with such flexibility as the common law permits. The restrictions placed around fraudulent calumny in the post-*Edwards* cases are not justified by precedent or principle.

Despite the fundamental common law base for fraud in probate cases, there is still room for equity. If refusal of probate, wholly or partly, is enough to do justice, then that is the remedy. But otherwise, probate may be granted, followed by equitable relief.

[38] *Munn v Briggs* (2010) 185 Cal. App. 4th 578.

Ademption of Gifts of Partnership Shares; Executor Removal

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Introduction

In *Lane v Lane*[1] the High Court ruled on whether a testamentary gift of a "share and interest" in a partnership adeemed on the basis that, at the time of death, the partnership had been dissolved but not yet wound up. The ruling appears to be the first consideration of such a question. The court also ruled on a claim for the removal of an executor.

The judgment of Jonathan Hilliard KC (sitting as a Deputy Judge of the High Court) contains illuminating observations on partners' rights in a partnership, the court's approach to the removal of personal representatives and the interaction between the interpretation of wills and the doctrine of ademption.

Facts

The dispute concerned the estate of Monica Lane (deceased). She had three children: David, Susan and Peter. Peter predeceased her and left two children: Daniel and Georgia. Monica's husband, Norman, also predeceased her.

During her life, Monica formed a trading partnership with Norman on the family farm in Lavenham, Suffolk. When Norman died, he passed his share and interest in the partnership to David through his will.

Monica and David started a new partnership. The partnership agreement provided that the partnership would dissolve on the permanent incapacity of a partner (among other things).[2]

By her last will Monica left David her "share and interest" in the partnership (hereafter the "Gift"), among other assets. She left other assets to Susan, Daniel and Georgia. She named David, Susan, Daniel and Georgia as beneficiaries of her residuary estate. She named David and Susan as executors.

David died after Monica. His wife, Karen, is the personal representative of his estate.

Monica's estate was later valued at almost £2.5 million.

Issues

Karen and Susan's relationship broke down. Various disagreements arose. One of these involved the Gift. Susan contended that Monica became permanently incapacitated before her death, causing the dissolution of the partnership, in turn causing the Gift to adeem on Monica's death.[3]

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[1] *Lane v Lane* [2024] EWHC 275 (Ch), 9 February 2024 ("*Lane*").

[2] *Lane* [2024] EWHC 275 (Ch) at [3].

[3] *Lane* [2024] EWHC 275 (Ch) at [5].

Karen issued a Part 8 claim against Susan. Karen sought a declaration that the Gift had not adeemed (hereafter the "construction claim"), replacement of Susan as executor by an independent professional (hereafter the "removal claim"), and ancillary relief. Daniel and Georgia were joined but played no active part in the proceedings, other than to express support for Susan remaining in office.

The construction claim proceeded on the basis that Monica did become permanently incapacitated before her death, although Karen did not admit this. Karen's primary argument was that, even if the partnership entered dissolution before Monica's death, she still had a "share and interest" in it at the date of her death, so the Gift does not adeem.[4] Her fallback argument was that the partnership was replaced by a new partnership between Monica—acting through her LPA attorney Susan—and David, because Susan and David proceeded on the basis that the partnership was continuing.[5]

As to the removal claim, Karen argued (in summary) that Susan should be replaced because the relationship breakdown had impeded and would continue to impede the estate administration, because Susan was in a position of conflict by virtue of her and her branch's interest in the estate and because Susan had delayed significantly in the administration.[6] Susan argued (in summary) that the administration was largely complete, a significant amount of this had been done by Susan's solicitors who could be trusted to do so, any future disputes could be brought back to court if necessary and would need to be even with a new executor and the problems with the administration had been caused by Karen.[7]

The Part 8 claim proceeded to trial on the written evidence. The court was not asked to resolve any disputes of fact, except where the position was so clear cut that it could be determined without oral evidence.[8]

Law

A specific gift fails for ademption if, at the date of the testator's death, its subject matter has ceased to exist as part of the testator's property, has fundamentally changed in nature or has been destroyed or converted into something else by the act of the testator or duly constituted authority.[9] It does not so fail if it has changed in name or form only but remains substantially the same thing.[10]

A share of a partner is a right to a proportion of what is left of the partnership assets after winding up.[11] The process of winding up is often referred to as "general dissolution".[12] This is different to a dissolution where a new partnership arises and takes on the assets and liabilities of the new partnership without a break in the continuity of the business.[13] This often occurs where a partner leaves the partnership. This is commonly called a "technical" or "notional" dissolution, though it is not the dissolution but at most the winding-up which is notional.[14]

In previous cases, gifts of partnership shares have been held to adeem where, by the time of death, the testator had left the partnership and been paid out the value of their share.[15] But there appears, before *Lane*, to have been no case considering such a gift where, at the time of death, the partnership was dissolved but not yet wound up.

[4] *Lane* [2024] EWHC 275 (Ch) at [16].
[5] *Lane* [2024] EWHC 275 (Ch) at [17].
[6] *Lane* [2024] EWHC 275 (Ch) at [82].
[7] *Lane* [2024] EWHC 275 (Ch) at [83].
[8] *Lane* [2024] EWHC 275 (Ch) at [64].
[9] *Jenkins v Jones* (1866) 2 L.R. 2 Eq. 323; [1866] 4 WLUK 97; *Re Slater* [1907] 1 Ch. 665 (CA); [1907] 4 WLUK 23.
[10] *Re Slater* [1907] 1 Ch. 665 (CA) at 671–673.
[11] *Sandhu v Gill* [2005] EWCA Civ 1297; [2006] Ch. 456 at [19].
[12] *Rojoda Pty Ltd v Commissioner of State Revenue* [2018] WASCA 224; (2018) 368 A.L.R. 734 ("*Rojoda*") at [101].
[13] *Rojoda* [2018] WASCA 224 at [102].
[14] *Rojoda* [2018] WASCA 224 at [102].
[15] E.g. *Ellis v Walker* 27 E.R. 210; (1756) Amb. 309.

The court has a statutory (and discretionary) power to appoint a person to act as personal representative in place of all or any existing personal representatives of the deceased.[16] The cases set out the criteria to which the court should have regard in exercising its discretion.[17] But the overriding consideration is whether the estate is being properly administered and the main guide is the welfare of the beneficiaries.[18]

Judgment

Both the construction claim and the removal claim succeeded.

Construction claim

The court considered it natural to describe a departing partner as having a "share and interest" in the partnership. Where one is focusing on a partner's economic rights, the natural and ordinary meaning of a "share" in a partnership reflects or at least includes the partner's entitlement to a proportion of the net proceeds of sale of the partnership assets after meeting all liabilities.[19] The natural and ordinary meaning of an "interest" in a partnership is a right to such a proportion.[20] These definitions focus their attention on what the partner receives at the end of the partnership.[21] Dissolution does not mark the extinction of a partnership.[22] It is the winding up process that produces the final cash sum to which a departing partner is entitled.[23] The share or interest does not disappear on dissolution but crystallises; dissolution marks the time from which it must be turned into a cash sum through the winding up process.[24]

The court rejected the submission that the Partnership Act 1890 s.43 converts a share in a partnership into a debt, so that no share or interest remains following the point of dissolution. A share or interest includes what a partner ultimately gets out of the winding-up process, and it would make little sense if the share or interest disappeared on dissolution.[25] The purpose of s.43 was to ensure that claims by a departing partner or their personal representatives were subject to the limitation period applicable to ordinary debts, and to make clear that the remaining partners were not trustees for the departing partner.[26] Section 43 does not reduce the rights of the departing partner to a debt, but merely states that the amount due in respect of their share shall be a debt, and a departing partner retains a bundle of rights.[27] Where all partners agree to bring the partnership to an end, all partners have rights under s.43, and the odd conclusion that none of the partners have any share or interest in the partnership cannot be avoided by contending that they have rights under s.38 to run the winding up; having conduct of the winding up is not decisive in whether someone has a share or interest.[28] Section 38 is an example of the partnership continuing post-dissolution in a particular respect.[29]

As to the construction of the Gift, the court considered it clear that Monica wished David to have the whole of the partnership, so the reference in the Gift to "share and interest" meant the rights to what will be received through winding up.[30] Monica still had the share and interest at the date of her death because

[16] Administration of Justice Act 1985 s.50, *Thomas & Agnes Carvell Foundation v Carvell* [2007] EWHC 1314 (Ch); [2008] Ch. 395 at [18].
[17] *Letterstedt v Broers* (1884) 9 App. Cas. 371; [1881–85] All E.R. Rep. 882, concerning removal of a trustee, said in *Thomas & Agnes Carvell* [2007] EWHC 1314 (Ch) at [44]–[47] to apply to applications under the Administration of Justice Act 1985 s.50.
[18] *Thomas & Agnes Carvell* [2007] EWHC 1314 (Ch) at [45].
[19] *Lane* [2024] EWHC 275 (Ch) at [25]–[27].
[20] *Lane* [2024] EWHC 275 (Ch) at [28].
[21] *Lane* [2024] EWHC 275 (Ch) at [32].
[22] *Lane* [2024] EWHC 275 (Ch) at [33].
[23] *Lane* [2024] EWHC 275 (Ch) at [34].
[24] *Lane* [2024] EWHC 275 (Ch) at [35]. The court (at [27] and [40]) derived assistance on this point from the judgment of Lord Reed in *Duncan v MFV Marigold PD 145* [2006] CSOH 128; 2006 S.L.T. 975.
[25] *Lane* [2024] EWHC 275 (Ch) at [39].
[26] *Lane* [2024] EWHC 275 (Ch) at [40].
[27] *Lane* [2024] EWHC 275 (Ch) at [41].
[28] *Lane* [2024] EWHC 275 (Ch) at [42].
[29] *Lane* [2024] EWHC 275 (Ch) at [43].
[30] *Lane* [2024] EWHC 275 (Ch) at [46]–[50].

there was no completed winding up.[31] This result also accorded with common sense and the way the phrase "share and interest" is commonly used in partnership law.[32]

In the premises, the court explained that the case was very far away from the classic case where a will refers to one asset, say a house, that is sold before death and thereby turned into another asset, namely cash.[33] Here, the share and interest in the partnership always, as the definitions set out above show, includes the right to receive the product of the winding up process.[34] As such, there was no ademption.

The court then distinguished *Re Beard*,[35] in which it was held that the gift in a partner's will passing their share and interest in the partnership did not include the debt due to them at the date of death in the form of a balance on the partnership's loan account. It did not follow from this that a debt owed under the Partnership Act 1890 s.43 did not pass as a share or interest in the partnership.[36] The reasoning in *Re Beard* was that the phrase "share and interest" did not refer to the debt due to the partner as an outsider to the partnership.[37]

Finally, the court rejected the argument that the provision in the partnership agreement for automatic dissolution on permanent incapacity (among other things) meant that the partnership would not survive for any long period of time but be dissolved so that its value could be distributed amongst the wider family. The partnership agreement said nothing about the distribution of the partnership's value on dissolution, and the purpose of the Gift was that the whole of the partnership would pass to David on Monica's death.[38]

Removal claim

The court rejected the argument that Karen must show misconduct endangering the trust property. Even without misconduct, the breakdown in relationship between executor and beneficiary can be such that the due administration of the estate is unlikely to be achieved expeditiously.[39]

The court noted serious concerns about how the administration of the estate had proceeded to date: Susan should have sought court directions a long time ago on the ademption issue;[40] there was no response to Karen's letter of claim or arguments in other correspondence concerning ademption;[41] Karen contended that no explanation had been provided about whether agricultural property relief and business property relief had been claimed, and the court received no evidence or explanation to contradict this;[42] the court received no up-to-date account of the estate and its assets from Susan;[43] there were a number of further potential disputes ahead;[44] and one reason for the delay in obtaining a grant was Susan's concerns over the validity of Monica's will, the basis of which was difficult to identify.[45]

The court also rejected the arguments that the issues with the estate administration could be dealt with by Susan's solicitors, and that the court's guidance would be needed whoever the executor was. Something needed to be done to ensure the proper conduct of the administration, and the court's concerns taken cumulatively pointed towards replacing Susan.[46]

[31] *Lane* [2024] EWHC 275 (Ch) at [49].
[32] *Lane* [2024] EWHC 275 (Ch) at [54]–[55].
[33] *Lane* [2024] EWHC 275 (Ch) at [51].
[34] *Lane* [2024] EWHC 275 (Ch) at [51].
[35] *Re Beard* (1888) 58 L.T. 629.
[36] *Lane* [2024] EWHC 275 (Ch) at [53].
[37] *Lane* [2024] EWHC 275 (Ch) at [53].
[38] *Lane* [2024] EWHC 275 (Ch) at [56].
[39] *Lane* [2024] EWHC 275 (Ch) at [63].
[40] *Lane* [2024] EWHC 275 (Ch) at [86].
[41] *Lane* [2024] EWHC 275 (Ch) at [87].
[42] *Lane* [2024] EWHC 275 (Ch) at [88].
[43] *Lane* [2024] EWHC 275 (Ch) at [89].
[44] *Lane* [2024] EWHC 275 (Ch) at [90]–[91].
[45] *Lane* [2024] EWHC 275 (Ch) at [92].
[46] *Lane* [2024] EWHC 275 (Ch) at [94]–[95].

The court noted the lack of liquid assets in the estate but considered that the beneficiaries would be better served by an independent professional administrator. This was due to the concerns about the administration to date, the friction between Susan and Karen, the greater cost likely to be incurred if Susan remained in office, an independent professional being more likely than Susan to identify proposals that would be acceptable without the need for court involvement, and the fact that the estate was incurring the costs of Susan's solicitors in any event.[47]

The court declined to stand the issue of removal over to see whether the administration improved. Standing over was not guaranteed to resolve the problems, there was no obvious date to stand over to, it could lead to further legal costs in arguing over removal at that date, and it was neither party's primary position.[48]

Comment

The court's conclusion on the construction claim was reached without difficulty but provides useful authority on the law. Indeed, it reflects the position taken in the practitioners' text, *Lindley & Banks on Partnership*,[49] but which did not hitherto have the benefit of supporting judicial authority.

At the core of the court's conclusion are the natural and ordinary meaning of the terms "share" and "interest" in the partnership context (derived from highly authoritative definitions), and the identity between the bundle of economic rights that a "*share and interest*" in a partnership represent before and after dissolution. The court's reasoning could apply in other cases where a testator, having gifted a share of a partnership, dies after dissolution but before the completion of winding up. The argument attempted by Susan could also, but for the judgment in *Lane*, have been attempted in many other cases where a partnership agreement has a clause relating to incapacity: it is of course common for a testator to lose mental capacity (even if it is in their final moments) before they die.

The court commented on how the doctrines of interpretation and ademption "fit together".[50] It observed that the court first interprets the gift to determine its subject matter, then asks whether the subject matter of the gift has ceased to exist as the testator's property or its nature has fundamentally changed.[51] This is methodologically informative. But it is probably unhelpful to interpret it as suggesting a two-stage analysis where the second stage is hermetically sealed. The court's conclusions about the testator's intentions can inform the application of the doctrine of ademption. The notional two stages could well be expressed as one: has the subject matter of the gift altered so as no longer to represent the gift that the testator intended? This is akin to other common questions of application of law to the facts, such as whether goods conform to a contractual description. The court in *Lane* was alive to this, observing that it saw no intention on Monica's part to distinguish between economic rights existing before and after dissolution.[52] Different testamentary wording and surrounding circumstances could of course lead to different results. The testator's intentions may assist in difficult cases where, unlike in *Lane*, the relevant difference (between the nature of the subject matter of the gift at the time of the will and at the time of death) is a matter of degree.

The court's conclusion on the construction claim meant that there was no need to consider Karen's fallback argument.[53] As explained earlier, this was an argument that, following Monica's incapacity, the partnership was replaced by a new partnership between Monica (whom Susan represented under a legal power of attorney) and David which did not dissolve before Monica's death.[54] In reality, the parties

[47] *Lane* [2024] EWHC 275 (Ch) at [101].
[48] *Lane* [2024] EWHC 275 (Ch) at [103].
[49] R. I'Anson Banks (ed.), *Lindley & Banks on Partnership*, 21st edn (London: Sweet & Maxwell, 2022), para.26–79.
[50] *Lane* [2024] EWHC 275 (Ch) at [21].
[51] *Lane* [2024] EWHC 275 (Ch) at [21].
[52] *Lane* [2024] EWHC 275 (Ch) at [50].
[53] *Lane* [2024] EWHC 275 (Ch) at [59].
[54] *Lane* [2024] EWHC 275 (Ch) at [17].

continued as if the existing partnership had not been dissolved. This argument could have given rise to useful judicial observations about whether partnership may be implied by conduct where a party is represented under a legal power of attorney. It was accepted by Susan at trial that this was a legal possibility, but she argued that it did not arise on the facts.

When discussing the law on removal applications, the court cited the authorities on the Administration of Justice Act 1985 s.50 but also highlighted the danger of the criteria enumerated in those authorities obscuring the simplicity of the legal test.[55] The simplicity is derived from the touchstone that is the beneficiaries' interests. The court reinforced the practice that questions of fact were not resolved on such applications.[56]

Removal applications are routinely heard by Masters and this was a rare case heard by a High Court Judge. In making these comments, the court referred—with implicit approval—to the 2020 Annual Lecture to the Association of Contentious Trust and Probate Specialists given by then Chief Master Marsh.[57] *Lane* appears to be the first judgment in which that excellent and informative lecture has been cited.

[55] *Lane* [2024] EWHC 275 (Ch) at [60]–[61].
[56] *Lane* [2024] EWHC 275 (Ch) at [7] and [64].
[57] *Lane* [2024] EWHC 275 (Ch) at [61].

International

From London to Tokyo: Cracking the Code of Seamless Estate Planning

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Abstract

This article about Japan forms part of a series, developed in this journal over the past several years, in which overseas professionals have been invited to explain the legal and tax framework in their own jurisdictions. The present comprehensive and authoritative article will be of assistance to any professionals in this country who are advising clients coming into contact, or who are already in contact, with Japan.

With the ease of international travel and increasing economic activities among countries, it is no surprise that more and more people now find themselves owning assets and investments across multiple jurisdictions. For Japanese citizens living in England and Wales and British citizens living in Japan with significant holdings in both countries, understanding the complexities of cross-border estate planning becomes important. In this article, English and Japanese lawyers and certified public accountant collaborate to help you navigate the legal intricacies of these two distinct jurisdictions by giving you an overview of Japanese succession laws and tax regulations following someone's death.

I. Introduction

In today's globalised world, it is very likely that you will find yourself dealing with Japanese legal and tax issues involving the estate of Japanese citizens living in England and Wales or British citizens[1] living in Japan with substantial assets in both countries. For an English law practitioner, this presents a big challenge not only because of the language barrier, but also because the Japanese legal system—which is a civil law jurisdiction—greatly differs from that of England and Wales.

In this article we discuss how to determine which succession law applies in international estates involving Japan and England and Wales and look at the major differences between their succession laws and inheritance and gift tax systems. We conclude with some practical tips to help you and your clients plan for succession and smoothly navigate these types of situations.

We hasten to add that this article is intended to be used for informational purposes only and therefore should not be a substitute for obtaining professional legal advice.

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[1] For this article we limit this to mean only those from England and Wales since Scotland and Northern Ireland have their own unique legal systems.

II. Governing law

One of the first things to consider when confronted with international estates is to identify which succession laws govern such estate. Depending on the type of assets and where they may be situated and the person's domicile, a Japanese citizen living in England and Wales or a British citizen living in Japan, may be subject to both English and Japanese succession laws.

The common law concept of "domicile" is unique to English law and was developed by English courts to determine which legal system applies to an individual where that individual has connections with more than one jurisdiction. Broadly, "domicile" can be summarised as a person's "permanent home". It is not necessarily his or her place of residence, ethnicity or nationality, such that a person can be a Japanese citizen who has been resident in the UK for many years and yet still be domiciled elsewhere.

There are three common law categories of domicile: (1) domicile of origin;[2] (2) domicile of dependency;[3] and (3) domicile of choice.[4] Everyone has a domicile under English law, starting with the domicile of origin at birth,[5] which is usually the country of the father's domicile (or the mother's if the parents were not married) at the time of the child's birth. If the parent changes domicile, the child's domicile may change to a domicile of dependency. A person can then acquire a domicile of choice by taking up residence in another country with the intention of making that country his or her permanent or indefinite home. If a domicile of choice is abandoned without acquiring a new domicile of choice the domicile of origin is revived.

As mentioned earlier, a person's domicile governs which law is applicable to different classes of assets in the estate. The succession laws of a person's domicile apply to his or her moveable assets such as bank accounts and shares of stocks and the law of where the immoveable assets are situated (*situs*) applies to his or her immoveable assets.

If a Japanese decedent is considered domiciled in England and Wales, then English law governs the decedent's movable assets while the decedent's immovable assets are governed by the law of the *situs*. If not, then Japanese law or whichever law in which the Japanese decedent is considered domiciled will govern succession and administration of the estate, and English law will only govern the succession and administration of immovable assets in England and Wales.

Japanese Decedent	**Domiciled in UK**	**Non-Domiciled in UK**
Movable assets	English Law	Law of domicile (Japanese Law)
Immovable assets	Law of the situs	English law but only to those in England & Wales

There is no similar concept of "domicile" under Japanese law and perhaps the closest equivalent would be that of the concept of *jyusho* (the place of permanent residence, as opposed to *kyosho*, the place of abode or physical residence). A person's *jyusho*, however, does not determine which succession law

[2] This is acquired at birth, based on the domicile of a child's parents (primarily the father's). Key factors to consider include:
- a legitimate child will take their father's domicile at the date of birth (even if the parents are separated by the time a child is born);
- if the child's parents were unmarried at the time of birth (even if they subsequently marry) or if the child's father dies before the birth, the child will take their mother's domicile.

[3] A dependent person takes the domicile of that person upon whom they are legally dependent. Dependent persons are:
- unmarried children under the age of 16 years; and
- persons who lack mental capacity.

A child's domicile of dependency (where they are unmarried and under the age of 16 years) closely follows the principles detailed in the domicile of origin above. When a child reaches 16 years, in most cases their domicile of dependency will continue and constitute a domicile of choice.

[4] After an individual reaches 16 years, any subsequent change to their father or mother's domicile will not affect their own. They will enter adulthood either with their domicile of origin or a domicile of dependency. An individual over 16 years can acquire a domicile of choice where they both: move to and establish residence in a different legal jurisdiction; and form an intention to live permanently and indefinitely within that jurisdiction.

[5] *Udny v Udny* [1866–69] L.R. 1 Sc. 441; (1869) 7 M. (H.L.) 89.

applies in Japan. Unlike in England and Wales, succession is governed by the national law of the decedent.[6] Therefore, if a decedent is Japanese at the time of his or her death, Japanese law governs the rules of succession of the decedent's estate.

In case of a British decedent in Japan, Japan will apply the conflict rules of English succession laws as discussed above.[7] Note again that under English law if the British decedent is considered domiciled in Japan, then Japan succession laws will apply to both the decedent's movable and immovable assets in Japan.[8] This situation highlights the importance of knowing and understanding or, at the very least, getting familiar with Japanese succession laws.

Exactly how different is Japanese succession law to English succession law?

III. Japanese v English succession laws

There are several notable differences between Japanese and English succession laws. For this article, we focus on three major ones. First, all rights and obligations (except those that are purely personal) of the deceased transfer to heirs automatically at the time of decedent's death,[9] which means that unlike in England and Wales there is no need for probate to transfer the assets to heirs in Japan. Second, as in other civil law jurisdictions, Japan has forced heirship rules, imposing restrictions on a person's testamentary freedom to dispose of his or her estate according to his or her wishes. Finally, holographic and even "secret wills" are considered valid and effective in Japan.

A. No probate necessary

Modelled mainly on the French Civil Code,[10] the Japanese Civil Code adopts the concept of universal succession,[11] which means that title to assets vests immediately in the heirs or devisees upon the decedent's death and need not pass through a "personal representative". Likewise, heirs directly succeed and become personally liable to the deceased's liabilities. Whether or not a decedent dies with a will, a creditor can go after an heir to pay the debts according to his or her intestacy share.

The heirs, however, may consider renouncing their right to succession to avoid incurring personal liability for the decedent's debts by filing a declaration with the Family Court within three months from the acknowledgment of the inheritance.[12] They may also make a qualified acceptance, a process somewhat similar to probate, that would limit their liability only to the decedent's property received by succession.[13] This process, however is not widely used in Japan because of the cost and time it involves.

Japanese courts generally do not handle succession matters. Transferring title of a decedent's assets is a matter of satisfying the Legal Affairs Bureau with respect to land, the corporation or transfer agent with respect to shares of stock, or the bank with respect to deposit accounts. The certificate of death of the deceased, probate documents from the home country, certificates showing the relationship between the heirs and beneficiary and listing all statutory heirs of the deceased, and powers of attorney given by the estate's personal representative, executor or heirs to persons in Japan, along with Japanese translations, usually suffice to transfer title ownership. However, the actual documents required will depend on the

[6] Act on General Rules for Application of Laws (Act No.10 of 1898) ("General Rules Act") art.36.
[7] General Rules Act art.36.
[8] General Rules Act art.4.
[9] Japanese Civil Code art.896.
[10] N. Mizuno, *Souzokuhou Kaisei to Nihon Souzokuhou no Kadai* (Revision of the Japanese inheritance law and the issues in the future), 90–4 HORITSU JIHO (2018) at 1.
[11] C. Danwerth, Principles of Japanese Law of Succession available at: *https://www.zjapanr.de/index.php/zjapanr/article/view/73/73* (Accessed on 28 November 2023).
[12] Japanese Civil Code art.915(1) in rel. Japanese Civil Code, art.939.
[13] Japanese Civil Code arts 922–927.

individual policies of the government offices, corporation, or bank, where title or custody of the asset is held.

B. Forced heirship rules

Unlike in England and Wales where testators generally have the flexibility to distribute their assets according to their wishes, testamentary freedom is more restricted in Japan. Although the decedent may determine the allocation of his or her estate by will,[14] his or her spouse, child or children and lineal ascendants as heirs will have a right to receive their statutory shares of the estate under forced heirship rules,[15] which applies regardless of the nationality of the heirs.

Under these rules, a surviving spouse, children and other issue are entitled to take half of their respective statutory share.[16] Parents and grandparents are entitled to one-third of their statutory share, while siblings are not entitled to anything at all.[17] Thus, if a decedent is survived by a spouse and one child, then the spouse and child are each entitled to elect to take at least 25% (one-half of their respective intestate share (50%)), regardless of how the decedent's assets are to be distributed under the decedent's will. Infringing an heir's legally reserved portion does not affect the validity of the will but it gives the heir a right to a monetary claim against the devisee.[18]

Eligible heirs must claim their forced heirship rights within one year after acknowledging the death of the deceased and denial of their rights.[19] They can also renounce their rights by obtaining approval from the Family Court prior to the inheritance. After the inheritance occurs, they can renounce their forced heirship rights at any time.

If a Japanese decedent domiciled in England and Wales dies, the succession of his or her moveable assets are governed by Japanese law, and therefore the above regime applies even to the heirs living outside Japan. To avoid the regime, the decedent can renounce his or her Japanese citizenship during his or her lifetime, but this is often an unacceptable option to most clients.

With respect to a British decedent domiciled in Japan, the property to which the forced heirship rules apply will depend, in part, on whether Japan succession law applies.

C. Japanese wills, foreign wills, and intestacy

A will must be made by a person at least 18 years in writing signed by the testator in the presence of two independent witnesses who must also sign the will in the presence of the testator (and of each other) in order to be valid under English law.[20] In contrast, some wills in Japan need not be witnessed at all.

There are three major forms of Japanese wills under Japanese Civil Code: (1) a holographic will (*jihitsu shosho igon*);[21] (2) a notarial will (*kosei shosho igon*);[22] and (3) a secret will (*himitsu shosho igon*).[23]

A holographic will is a will handwritten by the testator affixed with his or her seal, signed, and dated.[24] It does not have to be in Japanese nor does it have to be witnessed, although it will eventually need to be translated if not written in Japanese. From 2020, holographic wills registered at the applicable Legal Affairs Bureau no longer have to be registered with the Family Court.

[14] Japanese Civil Code art.902.
[15] Japanese Civil Code art.964. From 2019, gifts made 10 years or more before the commencement of succession will not be counted in the calculation of the statutory reserved portion of the estate of certain heirs.
[16] Japanese Civil Code art.1028.
[17] Japanese Civil Code art.1028.
[18] Revised Japanese Civil Code art.1046.
[19] Japanese Civil Code art.1042.
[20] Wills Act 1837 (ch.26).
[21] Japanese Civil Code art.968.
[22] Japanese Civil Code art.969.
[23] Japanese Civil Code art 970.
[24] Japanese Civil Code art.968(1).

A notarial will is the most commonly used form of will in Japan. As its name implies, a Japanese notary public drafts the will in its entirety based on the instructions of the testator, who must appear before the notary public. Unlike holographic wills, notarial wills are in Japanese and require at least two witnesses. If a testator cannot speak and read Japanese, he or she can still make the notarial will with the assistance of an interpreter. This type of will is less likely to be challenged, but the testator must come to Japan to execute it.[25] The notary retains the original will; however, the will does not need to be filed with the Family Court upon the decedent's death to become effective.

Finally, the third type of will is called a secret will, which is a will affixed with a seal and signed by the testator and placed in a sealed envelope. The testator presents the sealed envelope to a notary public before two witnesses and declared the contents to be his or her will. The notary public writes this information on the sealed envelope and signs, along with the testator and the witnesses. A secret will is similar to a holographic will in that its contents are known only to the testator. The main difference is that, unlike a holographic will, the existence of a secret will is confirmed by and recorded by the notary public and the two witnesses. Secret wills must be filed with the Family Court upon the testator's death.

Aside from these three types of will, Japan—just like England and Wales[26]—also considers the form of a foreign will valid if it complies with the law of:

(a) the place where the testator made it;
(b) the testator's nationality at the time when he or she made it or at his or her death;
(c) the place where the testator has a permanent address (*jyusho*) when he or she made it or at his or her death;
(d) where the testator had habitual residence (*kyosho*) at the time when he or she made it or at his or her death; or
(e) where real property is situated, as far as the real property is concerned.[27]

Thus, a valid will under English law covering the testator's worldwide assets can be recognised in Japan and vice versa. As a practical matter, however, it is advisable to execute a separate Japanese notarial will covering the decedent's assets in Japan to avoid the need for translations and to make it easier to coordinate with relevant Japanese authorities as regards the transfer of assets to the heirs. If this is difficult, then the English will may be used instead, bearing in mind the additional cost and time for its recognition.

Ideally, the decedent should prepare a will if he or she has several heirs and wants to allocate certain assets to certain heirs because, without doing so, the heirs must then agree on how to divide the specific assets among themselves,[28] which often results in disputes. In reality, however, few people make wills in Japan and instead rely on intestacy distribution. In this regard, the Japanese Civil Code provides that:

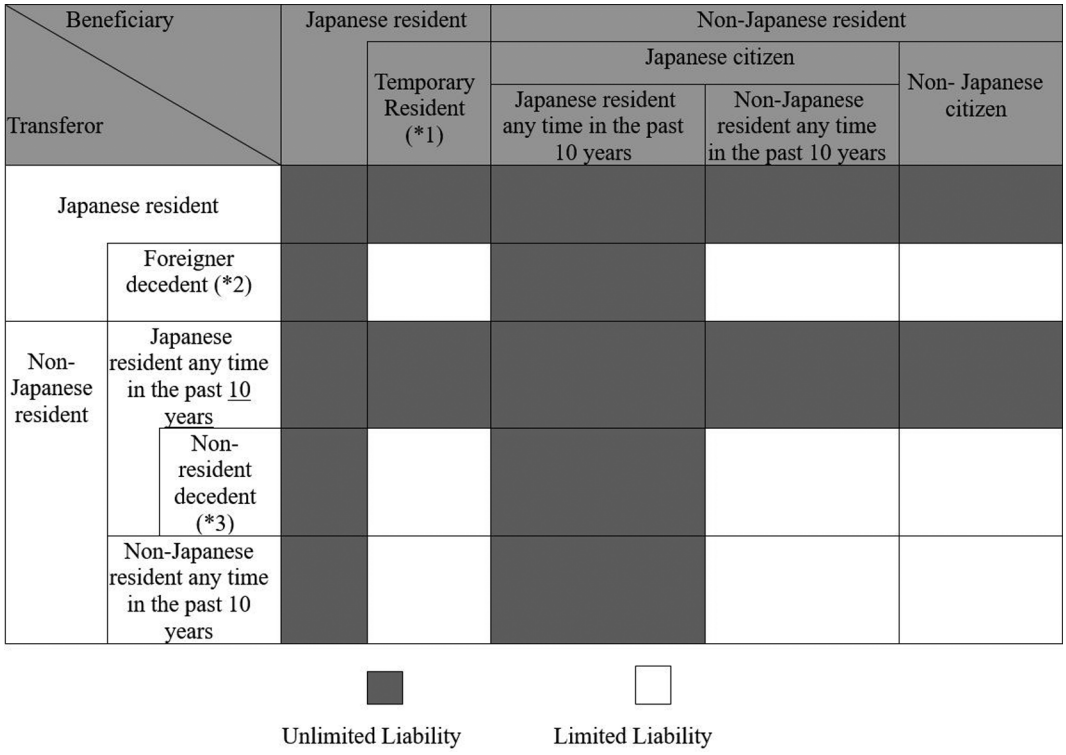
(1) If a spouse and children are the heirs, the spouse gets one-half and the children share equally the other half;[29]
(2) If a spouse and lineal ascendants (but there are no children) are the heirs, then the spouse receives two-thirds and the lineal ascendants share the remaining one-third;[30]
(3) If a spouse and siblings (but there are no children, other issue or ascendants), then the spouse receives three-fourth and the siblings share the remaining one-fourth;[31]

[25] Japanese Civil Code art.969.
[26] Wills Act 1963 (ch.44).
[27] Act on the Law Governing Formalities of Will (Act No.100 of 1964) art.2.
[28] Japanese Civil Code art.907(2).
[29] Japanese Civil Code art.900(i).
[30] Japanese Civil Code art.900(ii).
[31] Japanese Civil Code art.900(iii).

If there is only the spouse, but no children, grandchildren, ascendants or siblings, then the spouse is entitled to all the decedent's assets. Similarly, if there are only children or other issue, but no spouse, then the children, whether adopted, legitimate, or illegitimate, share equally all of the decedent's assets.

IV. Inheritance and gift tax system

The Japanese inheritance and gift tax system taxes the heir, devisee or donee (collectively "beneficiaries"), rather than the decedent, the decedent's estate, or donor (collectively "transferors"). Beneficiaries subject to Japanese inheritance or gift tax can be summarised in the following table:[32]



(*1) "Temporary resident" means a person who has a status of residence listed in the left-hand column of Table I of Immigration Control and Refugee and Recognition Act, whose total duration of residence is 10 years or less in the past 15 years prior to the commencement of inheritance.

(*2) A "foreigner decedent" refers to a person who had a resident status and had an address in Japan at the time the inheritance commenced.

(*3) A "Non-resident decedent" refers to a decedent who did not have a *jyusho* in Japan at the time of the commencement of inheritance, and who either: (1) had an address in Japan any time within the last ten years before the commencement of inheritance, and who did not keep their Japanese citizenship at any such time; or (2) had no address in Japan within the last ten years before the commencement of inheritance.

[32] Sōzokujin ga gaikoku ni kyoju shite iru toki, National Tax Agency website available at: *https://www.nta.go.jp/taxes/shiraberu/taxanswer/sozoku/4138.htm* (Accessed 18 March 2024).

Based on the table above, we can see that inheritance and gift tax is generally imposed on a worldwide basis (meaning that all assets of the transferor may be subject to inheritance tax and gift tax and beneficiaries may have an unlimited liability), but foreign assets may be excluded (limited liability, limited only to assets in Japan), depending on the respective residences of the transferor and beneficiary.

A beneficiary who has a *jyusho* in Japan when acquiring property upon the death of the deceased or by gift has an unlimited liability for inheritance or gift tax, regardless of nationality, except where the beneficiary is a Temporary Resident and the transferor is either a foreigner or a non-resident.[33] However, the transfer of overseas assets between foreigners and Japanese citizens who currently have an address or have had an address in Japan within the previous 10 years is not exempt.

To qualify for the above exemption, the beneficiary needs to meet the definition of a Temporary Resident, which means that he or she has to: (i) have had an address in Japan for not more than 10 out of the past 15 years looking back from the date of death/gift; and (ii) hold a visa issued under Table 1.[34] Even if he or she satisfies (i), he or she will not be considered a Temporary Resident if he or she fails to satisfy (ii) (i.e. who hold a visa issued under Table 2). Therefore, the transfer will be subject to worldwide taxation of Japan gift and inheritance tax, regardless of whom the transfers are made with.

The transfer of overseas assets to a beneficiary who is a Japanese citizen, not a resident of Japan but who has had an address in Japan within the ten years prior to the gift or inheritance is subject to Japanese gift and inheritance tax. If the beneficiary has not had an address in Japan within the ten years prior to the gift or inheritance, he or she will not be subject to tax so long as the transferor is a foreign citizen. Similarly, the transfer of overseas assets from a decedent or donor who is a Japanese citizen not a resident of Japan but had an address in Japan within the 10 years prior to the gift or inheritance is also subject to Japanese gift and inheritance tax.

From April 2021, the transfer of overseas assets from foreign citizens, regardless of the length of their period of residence in Japan, to Temporary Residents or non-Japanese citizens outside of Japan is exempt from Japanese gift and inheritance tax if the foreign citizen transferor holds a Table 1 visa. This updated exemption and disregard to the length of period of residence in Japan does not apply to a foreign citizen resident beneficiary of gifts and inheritances of overseas assets. Foreign citizen resident beneficiaries still need to have had an address in Japan for no more than ten of the past 15 years and hold a Table 1 visa in order to be considered "Temporary Residents" and be exempt from Japanese gift and inheritance tax on overseas assets received from foreign citizen transferors. The updated law does not provide an exemption on the transfer of overseas assets if either the foreign citizen resident transferor or beneficiary holds a Table 2 visa. This remains unchanged. It is therefore possible for a British citizen holding a Table 2 visa to be taxed on his or her worldwide assets passing to his or her British children. His or her children would have to file tax returns with the Japanese government and pay the tax.

Inheritance tax applies to all assets whether tangible, intangible, real, or personal property, unless otherwise specifically exempt under the law. Assets are valued in accordance with the provisions of the Japanese tax rules, which also apply to the gift tax system.

Inheritance tax is calculated on the assumption that the assets are passing under intestacy. Tax is allocated to each beneficiary based on the amount actually received. Basic exclusion is ¥30,000,000 (£157,260 approximately) plus ¥6,000,000 (£31,450 approximately) multiplied by the number of legal heirs.[35] Tax rates range from 10–55 per cent. If the beneficiary is not the decedent's child, parent, or spouse, the gross tax amount before deductions is increased by 20 per cent.

[33] Cases where inheritance tax is imposed, National Tax Agency website available at: *https://www.nta.go.jp/english/taxes/others/02/15001.htm* (Accessed 18 March 2024).

[34] A Table 1 visa under the Visa Status Table of the Immigration Control and Refugee Recognition Act includes work-related visas and does not include the following visa types: permanent resident, spouse or child of a Japanese national, spouse or child of a permanent resident, and long-term resident.

[35] Cases where inheritance tax is imposed, National Tax Agency website available at: *https://www.nta.go.jp/english/taxes/others/02/15001.htm* (Accessed 18 March 2024).

In contrast, the annual gift tax exemption per beneficiary is ¥1.1 million (£5,760 approximately). Gift tax will not be imposed if the total value of the items donated in a year do not exceed the basic exemption—that is, the beneficiary is not required to report and file a return for gift tax in this case. Any amount of gift(s) received above the exemption will potentially be subject to Japanese gift tax.

There is also a special system where the taxpayer can make an irrevocable election to integrate inheritance and gift tax when certain conditions are met. Under the special system,[36] referred to as "settlement of taxes at the time of inheritance":

(1) Qualified transfers are those from lineal ascendants who are aged 60 years and older made to their lineal descendants who are aged 18 years or older;
(2) Gifts of up to a total of ¥25 million (£131,050 approximately) are exempt from gift tax. Several gifts can be made tax-free as long as the total gifts do not exceed the ¥25 million threshold;
(3) Gifts are taxed at a rate of 20% on the amount exceeding the accumulated threshold of ¥25 million. The amount of gift tax, if any, will be treated as a prepayment of tax against a future inheritance tax liability;
(4) Valuation of the gifted assets will freeze at the time of the gift for the inheritance tax calculation; and
(5) Those who made this election will automatically be subject to the inheritance tax filing regardless of the situation at the time of inheritance.

The following are the rates for gifts and inheritance taxes in Japan:

Gift Tax Rates (for other than lineal descendants)		**Inheritance Tax Rates**	
Up to ¥2,000,000	10%	Up to ¥10,000,000	10%
¥2,000,001–¥3,000,000	15%	¥10,000,001–¥30,000,000	15%
¥3,000,001–¥4,000,000	20%	¥30,000,001–¥50,000,000	20%
¥4,000,001–¥6,000,000	30%	¥50,000,001–¥100,000,000	30%
¥6,000,001–¥10,000,000	40%	¥100,000,001–¥200,000,000	40%
¥10,000,001–¥15,000,000	45%	¥200,000,001–¥300,000,000	45%
¥15,000,001–¥30,000,000	50%	¥300,000,001–¥600,000,000	50%
¥30,000,001–¥45,000,000	55%	¥600,000,001 or more	55%
¥45,000,001 or more			

The filing deadline for inheritance tax is 10 months from the date of death, while for donor's tax, the person receiving the donation must file a return and pay the gift tax between February 1 and March 15 of the following year.

Taxation of trusts

In Japan, trusts do not offer any tax advantages according to the country's inheritance and gift tax laws. Regardless of whether the trust beneficiary gains unrestricted access to the principal or not, they are taxed

[36] Selecting taxation system for settlement at the time of inheritance, National Tax Agency available at *https://www.nta.go.jp/english/taxes/others/02/15003.htm* (Accessed 18 March 2024).

as if they received the assets outright.[37] This means that trusts do not provide a shelter from taxation, unlike in the UK where they can offer some tax benefits.

Further, inheritance tax law states that if beneficiaries cease to exist, remaining beneficiaries may acquire benefits, subjecting them to taxation.[38] If there are multiple beneficiaries, each is taxed as if they own the property they are entitled to receive from the trust.[39] Additionally, if someone becomes a beneficiary after the trust is established, they're taxed upon acquiring the right to receive delivery of property.[40]

In scenarios involving blended families, trusts might even lead to an increased tax burden due to the imposition of a 20% surcharge.[41] This aspect further underscores the limited utility of trusts in mitigating tax liabilities within the Japanese legal framework.

In Japan, there is no distinct notion of trust income apart from the beneficiary's own income, as the beneficiary is considered the owner of the trust assets.[42] Taxation applies to the income as it is earned, following a current-year basis. Whether the income is distributed to the beneficiary or retained within the trust is irrelevant.

V. No UK-Japan treaty for estate, inheritance, and gift tax

Japan has signed only one tax treaty in relation to estate, inheritance and gift tax, which is that with the US. The purpose of the treaty is to avoid double taxation of inheritance tax in Japan and estate tax in the US.

There is a tax treaty between Japan and the UK but it does not include inheritance or gift taxes.[43] If a transfer is liable to inheritance or gift tax and also to a similar tax imposed by another country with which the UK does not have an agreement, you may be able to get relief under Unilateral Relief provisions, in relation to assets outside of the UK. HMRC gives credit against inheritance or gift tax for the tax charged by another country on assets situated in that country. The general position under international law is that real estate and other immovable assets are subject to the inheritance tax regime of the country in which they are located at the death of the owner.

VI. Other considerations

In handling matters related to taxation and inheritance in Japan, it is essential for clients to maintain copies of birth, marriage, and death certificates of family members. These documents serve as crucial evidence and may be required during various legal proceedings or when dealing with tax authorities.

It is also important to identify and engage appropriate Japanese professionals who specialise in the relevant areas. While Japanese lawyers may provide legal guidance, they typically do not handle tax advice and compliance matters extensively. Therefore, clients should seek out certified public accountants (CPAs) or tax advisers who possess the expertise and experience necessary to navigate the complexities of Japanese tax laws and regulations.

By collaborating with knowledgeable professionals who understand the intricacies of Japanese taxation and inheritance laws, clients can ensure proper compliance and effective management of their financial

[37] The Japanese Trust Act defines beneficiaries as those holding beneficial interest in the trust property, with rights to distribution claims and the right to request a Trustee or any other person to carry out certain acts under the provisions of the Trust Act to secure said claims: Japanese Trust Act (Act No.108 of 2006) art.2, paras 6–7.

[38] Inheritance Tax Act 1984 art.9(2), para.3.

[39] Japanese Order for Enforcement of the Income Tax Act(Cabinet Order No.96 of 1965) art.52, para.4.

[40] Inheritance Tax Act 1984 art.9(2), para.2.

[41] Inheritance Tax Act art.18.

[42] A "beneficiary" is one who "currently" enjoys the beneficial rights and is deemed to possess all the assets and debts of the trust, and its profits and expenses are deemed attributable to him or her: Japanese Income Tax Act (Act No.33 of 1965) art.13, para.1.

[43] Convention Between Japan and the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains available at: *https://www.mof.go.jp/tax_policy/summary/international/press_release/SynthesizedTextforJapan-UKEN.pdf*.

affairs. This proactive approach can help mitigate risks and facilitate smooth resolution of any legal or tax-related issues that may arise.

VII. Tips for practitioners

Encourage your client to plan. Making a will is better and more predictable than relying on default rules. A separate Japanese will is often advisable. A notarial will in Japan is best but, if that is not possible, consult a Japanese lawyer about using a UK will.

Be mindful of the forced heirship rules if you have a Japanese citizen client.

Be careful about using trusts. Putting Japanese assets in trust may create practical problems, and it may not achieve the best tax result. Japanese tax authorities are very strict especially with foreign trusts.

Consider the timing of estate and inheritance tax returns. UK has a shorter deadline compared to Japan and therefore may require that preparations in Japan be made much faster.

If you have a UK citizen client living in Japan who wants to leave UK assets to UK beneficiaries, the client may want to move his residency out of Japan before death.

If your client tells you that his Japanese parent passed away, recommend the client seeks advice in Japan. Suppose your client is a Japanese citizen. Your advice is to stay alive more than 10 years after he or she leaves Japan. Count 10 years from the date of his or her departure. The beneficiary who is a Japanese citizen also needs to meet that requirement.

Suppose your client is a British citizen temporarily living and working in Japan. Again, there are two requirements to be a Temporary Resident: (1) to reside in Japan with a "Table 1" visa under the Immigration Control and Refugee Recognition Act (the Act), such as a work visa; and (2) having resided in Japan for not more than 10 years. Because the Table 1 visa includes work visas such as intra-company transferee and dependent visas, many foreign citizens and their family members are likely to satisfy these two requirements. Then, Japanese worldwide taxation will not apply.

In contrast, if your client is a British citizen who: (1) resides in Japan with a "Table 2" visa under the Act, such as a spouse visa; or (2) has resided in Japan for more than 10 years, your client will not be a temporary resident, and Japanese worldwide taxation will apply.

Suppose your client is a British citizen who has resided in Japan for more than 10 years and decides to return to the UK in the near future. Surprisingly, all your client's worldwide assets will remain subject to Japanese inheritance and gift tax for 10 years even after leaving Japan. In that case, the advice to your client is: stay alive for more than 10 years after leaving Japan. If he or she dies within 10 years, all their worldwide assets will be subject to Japanese taxes. If your client stays alive for more than 10 years, however, only assets inherited by a beneficiary who is subject to Japanese taxes (e.g. your client's Japanese spouse) will remain subject to Japanese inheritance tax for 10 years after your client's spouse leaves Japan.

VIII. Conclusion

Navigating the complexities of cross-border estate planning involving Japan and England and Wales requires careful consideration of legal and tax implications in both jurisdictions. As highlighted in this article, the differences in succession laws and tax regulations between these two distinct legal systems can present significant challenges for individuals with assets spanning both countries.

By collaborating with English and Japanese legal professionals, as well as certified public accountants, individuals can gain valuable insights into the intricacies of international estate planning. From determining applicable succession laws to understanding inheritance and gift tax systems, thorough preparation and proactive planning are essential to ensure a smooth transition of assets across borders.

While this article provides an overview of key considerations, it is important to note that individual circumstances may vary, and professional advice tailored to specific situations is crucial. As such, readers

are encouraged to seek guidance from qualified legal and financial advisers to address their unique estate planning needs effectively.

In conclusion, by staying informed about the legal and tax implications of cross-border estate planning and seeking expert assistance when needed, individuals can navigate these complex matters with confidence and ensure the preservation and transfer of their assets in accordance with their wishes.

EU Matters

Forced Heirship is not a Human Right

Patrick Delas*

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Abstract

There is an obvious tension between Anglo-Saxon freedom of testamentary disposition and continental systems of fixed inheritance rights, assisted by the EU Succession Regulation. This has already proved fertile ground for litigation and articles on the subject in this journal.[1] *The present author now has the opportunity of exploring one of the latest examples of that tension in a case relating to the estate of Maurice Jarre.*

Introduction

The European Court of Human Rights (ECtHR) has dismissed Jean-Michel and Stéphanie Jarre's claim over their father's estate and confirmed that "children have no unconditional right to inherit their parents' property".[2]

Maurice Jarre

French composer and conductor Maurice Jarre (three Oscars,[3] nine nominations) died on 29 March 2009 in Malibu where he had been living since the 1960s. He leaves his worldwide estate to his fourth wife Fui Fong Khong though a Californian trust.

His children Jean-Michel and Stéphanie (the former himself a successful musician) claim a share over their father's French copyrights, under French forced heirship.

The case was dismissed by *Cour d'Appel de Paris* on 11 May 2016[4] and reached the *Cour de Cassation* on 27 September 2017.[5]

As for the deceased's habitual residence (then the law applicable to the succession of movable assets) the *Cour de Cassation* confirmed that the last domicile of the deceased was in the State of California where his settlement had been "longstanding and permanent".[6] The *Cour de Cassation* referred to the

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[1] P. Delas, "Jurisdiction and proper law under the Succession Regulation" (2019) 4 P.C.B. 25; P. Delas, "Reserved rights for European citizens under French law" (2022) 1 P.C.B. 4.

[2] *Jarre v France* n° 14157/18 ECtHR 15 February 2024.

[3] *Lawrence of Arabia* (1963), *Dr Zhivago* (1966), *Passage to India* (1985).

[4] *Cour d'Appel de Paris* 11 mai 2016 RG14/26247 Jarre.

[5] Cass 1st Civ n° 1004 16-13-151 and n° 1005 16-17-198, 27 septembre 2017.

[6] "*Ancienne et durable*".

Preamble of the Succession Regulation, referring to "the duration and regularity of the deceased's presence in the State concerned" and "the conditions and reasons for this presence".[7]

With regard to the *ordre public* nature of forced heirship, the *Cour de Cassation* stated that the designation of a foreign law that does not include forced heirship, by the rule of conflict, can only be rejected "if it leads to a situation incompatible with principles of French law considered essential". The *Cour de Cassation* added that "to the extent that the claimants are not in a situation of economic precariousness or need, there is no reason to disregard the rule of conflict".

The *Cour de Cassation* finally quoted art.35 of the Succession Regulation:—

> "The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the *ordre public* of the forum."

In line with the *Cour d'appel de Paris*, the *Cour de Cassation* concluded that the *réserve légale* is not a matter of *ordre public* in an international context.[8] The *Cour de Cassation*, however, has introduced two restrictions:—

(1) The applicable law excluding the *réserve légale* should not lead to a situation revealing "incompatible with the principles of French law considered essential". The *Cour de Cassation* referred here to discrimination between heirs "based on gender, religion or the nature of their filiation".[9]

(2) The exclusion should not result in a "*situation of economic precariousness or need*" for the excluded beneficiaries. The *Cour de Cassation* was here in line with the evolution of the legislation whereby "the ailment character of the *réserve* now takes precedence over preservation of the family property".[10]

European Court of Human Rights

On 21 March 2018, Jean-Michel and Stéphanie brought the matter to the European Court of Human Rights (ECtHR) claiming "failure to respect family rights" and "excessive interference with legal certainty. They referred to:—

> **"Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[11]
>
> **"Right to a fair trial**
>
> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[12]

In substance Jean-Michel and Stephanie claimed the benefit of the "*droit de prélèvement*" of 14 July 1819:—

[7] Succession Regulation (EU) No.650, 2012, preamble s.23.
[8] E. Fongaro, la lettre de la FNDP, n° 3 janvier 2017.
[9] *Cour d'Appel de Paris* 11 mai 2016 RG14/26247 Jarre.
[10] *Cour d'Appel de Paris* 11 mai 2016 RG14/26247 Colombier.
[11] ECHR art.1.
[12] ECHR art.6.

> **"Loi du 14 juillet 1819, art.2**
>
> In a distribution of an inheritance between foreign and French heirs, the latter will deduct from the property located in France a portion equal to the value of the property located in a foreign country from which they would be excluded, for whatever reason, under local laws and customs."

They claimed that the "*droit de prélèvement*" was abolished by the *Conseil constitutionnel* on 5 August 2011,[13] two years after Maurice's death and that it was reinstated by in—

> **"Article 913 Code Civil**
>
> When the deceased or at least one of his children is, at the time of death, a national of a Member State of the European Union or habitually resident there and when the foreign law applicable to the succession does not allow any protective reservation mechanism for children, each child or their heirs or successors in title may exercise a compensatory appropriation on existing property located in France on the date of death, so as to be restored into the reserved rights granted to them by French law, within the limits of these."[14]

This "temporary disappearance" of the *droit de prélèvement* results in a breach of equality between beneficiaries and in the violation of legal certainty.

Finally, Jean-Michel and Stéphanie highlighted the similarity of their case with the case of *Caron*,[15] where the *Cour de cassation* had ruled that the transfer of a French property governed by French law into a corporate structure governed by the laws of the State of New York in order to avoid forced heirship constituted a fraud.[16]

The decision

Unanimously, the ECtHR concluded that there was no violation of the European Convention for the Protection of Human Rights.

The abolition of *droit de prélèvement* of 1819 in 2011 only results from "normal control of statute in a democratic state".

At the time of the decision of the *Conseil Constitutionnel* (5 August 2011), Maurice's succession had been "virtually open" since the date of his death (29 March 2009) but remained disputed.

Consequently, Jean Michel and Stephanie were never called upon to succeed their father. Their situation was therefore not definitively resolved, even if the law in force at the time was in their favour.

Jean Michel and Stephanie were at no time denied access to a fair trial, and the *Conseil Constitutionnel's* decision of 5 August 2011 was known at the time of their claim before the *Cour de cassation*.

The French Courts "respected the testamentary freedom of the deceased" whose wishes reflected a "continuous and well-defined approach to benefit his surviving spouse from all of his property … without 'fraudulent intent,' whereas the claimants did not appear to be in a situation of economic precariousness or need".

Therefore, the ECtHR sees "… no reason to depart from the reasoning of the (French) courts to the extent", in particular since the ECtHR "has never recognised the existence of a general and unconditional right of children to inherit part of their parents' property".

[13] See *https://www.conseil-constitutionnel.fr/decision/2011/2011159QPC.htm*.
[14] Loi n° 2021–1109 du 24 août 2021.
[15] See *https://www.legifrance.gouv.fr/juri/id/JURITEXT000007015476/*.
[16] Cass 82-15.033 du 20 mars 1985 *Caron*.

Conclusion

By confirming the authority of the *Cour de cassation* decisions of 2017, the ECtHR decision clarifies the definition of *international ordre public*, which may only help with the interpretation of art.35 of the Succession Regulation.

The decision goes against a ministerial response given on 21 November 2023 which considered that the (re)introduction the *droit de prélèvement* in art.913 of the Code Civil on 24 August 2021 "makes forced heirship a principle of international *ordre public*".[17]

It does not, says the ECtHR.

However, the restrictions introduced by the *Cour de cassation* with reference to the "principles of French law considered essential" (equality in terms of gender, race of legitimacy) and the factual circumstances of the case (the beneficiaries' economic position) are to be upheld.

[17] See *https://questions.assemblee-nationale.fr/q16/16-7936QE.htm*.

Residue

Domicile and Residence—Prospective Tax Changes from April 2025

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Introduction

This is our second article for this journal on the subject of the United Kingdom's (UK's) tax treatment of foreign domiciliaries. The first cast doubt on the projections of an extra £3.2billion in tax if the link between taxation and domicile was severed.[1] At the time, it was the Labour Party relying on that figure. As every private client practitioner will now know, the Conservative government's Budget borrowed the general thrust of Labour's policy. It is likely that the decision to do so was a political move rather than an economic one. This second article will explore the current plans.

The starting point is that a residence-based tax system, to replace a system where residence and domicile are both relevant and bear a complex relationship to one another, is sensible. While questions over the meaning and application of the Statutory Residence Test[2] and Treaty Residence are likely to grow in importance and will remain areas of complexity, the opportunity for long-overdue simplification should be welcomed. The questions that remain are whether the current plans are the right measures, at the right time, and whether they can be said, with any confidence, to be likely to have a beneficial economic effect.

There is no draft legislation. It is generally understood that the government has instructed a specialist to draft some clauses, which will be published this summer. What is not known is how far these will go.

Inheritance tax

It is almost certain the draft clauses will not include significant inheritance tax changes, since wider consultation has been promised in respect of those.[3]

At present, all we know is that, if they remain in power for long enough to consult and legislate, the Government would replace domicile with a long-term residence test as a relevant factor for inheritance tax, probably operating after a decade of UK residence under the Statutory Residence Test. Equally, it

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[1] A. Hardy and O. Marre, "Aspects of domicile in the modern world" (2023) 3 P.C.B. 118–123.
[2] Finance Act 2013 Sch.45.
[3] HM Treasury Policy paper, *Spring Budget 2024: Non-UK domiciled individuals policy summary*, 6 March 2024. Available online: *https://www.gov.uk/government/publications/spring-budget-2024-non-uk-domiciled-individuals-policy-summary/spring-budget-2024-non-uk-domiciled-individuals-policy-summary*.

has been suggested by the Government[4] that there will be a 10 year tail for individuals subsequently becoming non-resident. Thought will need to be given to how the new domestic law will operate in the context of Double Tax Treaties; and whether consequential amendments will be made to other inheritance tax provisions which currently involve a requirement to consider domicile, such as trustee residence.[5]

The Government has promised that people who are currently neither domiciled nor deemed to be domiciled within the UK can settle excluded property trusts until 5 April 2025, and that these will be grandfathered. This is a complicated assurance.

First, there is no certainty that the Government will be in office by 5 April 2025 or that their proposed grandfathering will be enacted by a future Labour government. An individual might rush to settle assets onto a trust only to find that there is no inheritance tax benefit and he or she has ended up with a structure he or she would not otherwise have wanted.

Secondly, whether or not to settle assets onto excluded property trusts will anyway be a decision that most clients need to take in the round, and the tax benefits of doing so will undoubtedly depend on the final form of the inheritance tax legislation, as well as the income tax and capital gains tax treatment of those assets in the hands of: (a) trustees; and (b) individuals from April 2025—not least in the light of the Budget's suggested transitional provisions for those other taxes. If the new wider rules are going to encourage only short-term residence in the UK for those with significant overseas assets (see below), tying those assets up in a trust to secure an inheritance tax benefit which may or may not accrue somewhere between one and 10 years hence, assuming the individual remains in the UK that long, and will be lost again a decade later, may or may not be an opportunity to seize today. The best that can be said is that this will be a question to be decided with a degree of crystal ball gazing and on a case-by-case basis.

This is why piecemeal legislation—some of it announced in a rush, and some of it perhaps passed in a rush—is far from ideal.

Capital gains tax and income tax—individuals

It is more likely that draft clauses will soon emerge for the treatment of offshore gains and offshore income accruing to individuals. The outline proposal suggests the following:

From 6 April 2025 a new regime will apply for the first four tax years that an individual is UK tax resident after a period of 10 years' non-UK tax residence. Eligible individuals will not pay tax on offshore income or gains (termed "FIG" in the technical note)[6] arising in the first four years, where a claim is made, and will be able to remit these funds to the UK without additional charges.

Under this new regime, individuals will not be required to track the movement of their FIG through investments in the way they are required to do now under the current regime. This will, the technical note promises, "make the new regime simpler than the remittance basis regime". In that sense, it will indeed be simpler. For that matter, as we note above, a regime which links tax to residence rather than domicile should be altogether simpler. But how many internationally mobile individuals will come to the UK when they know they will be taxed on their worldwide income and gains on the arising basis after just four years? The period should have been longer. The numbers of people who will leave because they never qualify, or who will come briefly, or who will come and remain are entirely unknown and any speculation is nothing but guesswork. The economic impact is impossible to predict.

If an individual leaves the UK temporarily during the four year period, he or she will be able to make a claim for any of the qualifying tax years remaining on their return to the UK. This is perhaps going to

[4] HM Treasury Policy paper, *Technical note: Changes to the taxation of non-UK domiciled individuals*, 7 March 2024. Available online: *https://www.gov.uk/government/publications/changes-to-the-taxation-of-non-uk-domiciled-individuals/technical-note-changes-to-the-taxation-of-non-uk-domiciled-individuals*.

[5] Inheritance Tax Act 1984 s.218.

[6] HM Treasury Policy paper, *Technical note: Changes to the taxation of non-UK domiciled individuals*, 7 March 2024.

be a less simple measure. It is likely principally to benefit people whose movements are taken otherwise than for tax purposes, but who nevertheless take detailed tax advice in good time.

The technical note also says that "treaty residence or non-residence … will be ignored". It is not clear what this means.

Individuals who, on 6 April 2025, have been tax resident in the UK for fewer than four years (after a period of 10 years' non-UK tax residence) will be able to use this new regime for any tax year of UK residence in the remainder of those four years. Longer-term residents on the remittance basis will not. Instead, there are promised some transitional provisions.

Transitional provisions—individuals

The technical note provides some rather more complex rules for people who have been on the remittance basis and will lose that benefit from 5 April 2025.

There will be a one year reduction in the amount of foreign income that will be subject to tax for individuals who move from the remittance basis to the arising basis from 6 April 2025 and who are not eligible for the new four year FIG regime. For these individuals only 50% of the foreign income arising in 2025–26 will be subject to tax. The reduction in the amount of foreign income subject to tax will apply for one tax year only and the reduction will not apply to foreign chargeable gains. This will doubtless be welcomed by clients with a specific profile, but in effect it seems likely that it will give people a year to decide whether to leave while contributing 50% of what they could be contributing to the public purse. Will that suit a successor government? What will the impact be, if this law ever bites, on the economic projections? It is surely too early to know.

Other transitional rules will apply for individuals who have claimed the remittance basis and are neither UK domiciled nor UK deemed domiciled by 5 April 2025. If, on or after 6 April 2025, such people dispose of a personally held foreign asset that they held at 5 April 2019, they will be able to elect to rebase that asset to its value as at 5 April 2019. This rebasing will be subject to conditions that will, the technical note promises, "be set out later". The 2019 date for rebasing has been much discussed. It will help some clients and not others. It is another complexity, which in due course will require professional valuations to be sought in order for an informed decision to be taken. The more immediate question for many clients will be whether the "conditions that will be set out later" will be such as to make it preferable to accelerate the crystallisation of offshore gains; or whether the new regime will be better than the existing one. That makes the benefit, or loss, to the public purse of this provision impossible to predict. It makes a decision now very difficult.

The third transitional provision to have been announced is a new 12% rate of tax for remittances of FIG in tax years 2025–26 and 2026–27. Note that the technical note specifies that these will be restricted to circumstances "where the FIG arose to the individual personally in a year when the individual was taxed on the remittance basis and the individual is UK resident in the relevant tax year". It seems gains arising to offshore trusts and attributed to individuals will not benefit.

Finally, there is a promise that the mixed fund rules will be simplified. Perhaps the question of how to do so is regarded, in itself, as complex because no details have been provided.

Income and gains—trusts

Apart from the important note that the 12% tax rate for 2025–2027 will be unavailable, the tax treatment of offshore trusts is currently more embryonic. It is not known whether the first raft of legislation will include relevant law or not. If it does not, the question of whether to settle assets or not will, in effect, remain almost impossible to answer. But if the new legislation does cover trusts, the draftsman carries a heavy burden without any prior public consultation.

What has been said, in the technical note, is that the protection from tax on income and gains arising within settlor-interested trust structures will no longer be available for non-domiciled and deemed domiciled individuals who do not qualify for the new FIG regime. FIG arising in the trust (whenever established) from 6 April 2025 will be taxed on the settlor on the same basis as UK domiciled settlors at present. This might appear to be a simplification. In reality, it is likely to put the spotlight firmly on other equally complex reliefs—the motive defences, substantial shareholding exemption, and treaty residence.

Anti-forestalling

The Government has not announced any anti-forestalling. Indeed, the inheritance tax commentary they have provided seems to encourage partial forestalling by settling excluded property trusts before 6 April 2025. What is the effect of taking advantage of this statutory invitation on the availability of the motive defences, which will be necessary to avoid those new settlements having severe income tax consequences under the Transfer of Assets Abroad regime? It might have been thought that settling a trust in those circumstances cannot be tax avoidance; but the discussion of the law in recent cases such as *Rialas*[7] and *Fisher*[8] invites, at least, a considered approach.

Economics

It emerges from the analysis above that any economic forecasts for the tax to be raised by the new regime are, in our view, guesswork.

Simplification

The concept of taxing by reference to residence rather than both residence and domicile could lead to simplification. The analysis above, however, shows that significant complexities will remain and, indeed, may be created by the new regime.

Decision time?

What, then, should clients now do? For some the question will be straightforward.

There will be people for whom the new regime is hugely beneficial—for example people born in the UK with a domicile of origin here, who have worked abroad and wish now to return.

There are others for whom it will be, most likely, neutral—for example people who are intending to come to the UK for only a brief period, or those who have existing structures and a good claim for the motive defence.

For many clients, however, decisions will need to await at least draft clauses, and at best full knowledge of the legislation as a whole. Given the electoral cycle and the lack of current information, the timeframe imposed makes cautious decision-making impossible. The best that individuals can do is weigh up the most likely costs and benefits under the new regime as quickly as possible. For people in a fiduciary position, such as trustees, there will be additional concerns and they would be well-advised to take comprehensive advice on their options.

It is, in our view, regrettable that the Government has decided to rush this project. It could have been a constructive one. But as it is, it has caused confusion and may well bring little benefit to the public purse.

[7] *Rialas v Revenue and Customs Commissioners* [2020] UKUT 367 (TCC); [2021] S.T.C. 186.
[8] *Revenue and Customs Commissioners v Fisher* [2023] UKSC 44; [2023] 3 W.L.R. 1113; [2023] S.T.C. 1938.