Title Research

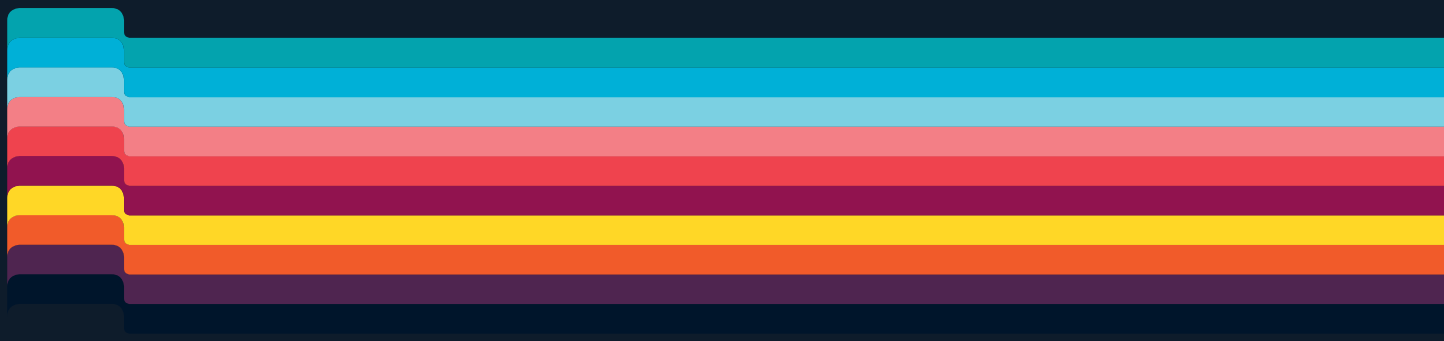
Entitlement

Spring 2018

The 'Unconscionable Bargain' Personal Representatives, Duty and Contingency Fee Arrangements

Plus:

- Gill Steel discusses **Trusts distress**
- Katie Scott talks **Testamentary Capacity**
- Title Research's most **interesting case studies**



Quarterly insight from the genealogy and asset repatriation specialists

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Specialist support for estate administration

Entitlement

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Welcome to Title Research's quarterly news digest – **Entitlement.**

In this issue we have three articles from guest contributors, including Richard Thomas of IDR Law, Gill Steel of LawSkills and Katie Scott, a barrister at 39 Essex Chambers. As always, we hope you find the topics discussed informative and of value to your private client practice.

Alongside the new season brings exciting new ways in which Title Research can help support you when complications arise from the estate administration process. Firstly, we are proud to announce the launch of our UK Shares fast-track service. We have helped value and manage UK holdings for many years, however our new service allows for the sale of a holding within 48 hours and receipt of funds in to your client account within 7 working days thereafter. This can be of huge benefit should you need to liquidate assets quickly and move the estate on. If you would like to hear more about this service, please do contact us direct on 0345 87 27 600 or email: info@titleresearch.com

Alongside this, we are also proud to announce our new FamilyChecker™ service. We find increasingly that solicitors are presented with what is believed to be a complete family tree prepared by the Personal Representative, which details the full extent of the family. Traditionally, our role is to reconstruct trees and verify the full extent of who should benefit and prove entitlement when little information is known. This new service provides you and your client peace of mind that the tree presented is correct and we will do this by documenting any events of birth, marriage, death and adoption that have not already been obtained. We carry out confirmatory searches of the birth and marriage indices and finally, by interviewing all potential heirs to ensure all information is correct. We will do this for a fully fixed fee which includes an insurance policy for comfort so that the Personal Representative is fully protected from any potential future liability.

If you think we might be able to assist with a matter as above, please do get in touch with us and we'll be able to provide a free initial assessment.

Anthony Allsopp
Head of Client Services

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The 'Unconscionable Bargain'

Personal Representatives, Duty and Contingency Fee Arrangements

Guest contributor: Richard Thomas

Richard Thomas is a solicitor at IDR Law and focuses exclusively on matters relating to contentious Wills, Trusts and estates.

Ordinarily, when a personal representative commissions a third-party to carry out work on behalf of a deceased's estate, there is a contractual relationship formed between the personal representative and the third-party.

This contract, which usually includes a 'scope of works', sets out the mechanism by which work will be charged. This is commonly based around hours worked multiplied by an hourly rate, plus disbursements, or a form of fixed fee arrangement.

Work commissioned to assist the administration of an estate, which is incidental to the proper performance of the duties of a personal representative and not unreasonable, will be treated as a legitimate estate expense and paid out of the estate before division.

However, many heir hunters will not contract with the personal representative in the usual manner. Instead, the 'go ahead' is given to the heir hunter, along with whatever information is known to the personal representative, for the heir hunter to go and locate the beneficiaries. Beneficiaries are then contacted and persuaded into signing up to agreements that often read like this:

> **"If we, after you have signed the agreement, disclose details to you of your entitlement, and if you are entitled to receive the inheritance, then you agree to instruct the personal representative to pay us X% by way of direct deduction from your share."**

By its very nature, it is our view that this type of contingency fee agreement encourages misrepresentation, is potentially champertous and could potentially be set aside by a Court for being an 'unconscionable bargain'.

For the personal representative who instructed the heir hunter, there are additional problems thrown up despite there being no contractual relationship between them and the heir hunter.

It is a fundamental rule of equity that a trustee is not permitted to make a profit out of his or her trust. No personal representative, therefore, could ever enter into a valid agreement with a beneficiary who was unaware of his or her entitlement, whereby their entitlement would be disclosed in exchange for a reward. If a personal representative cannot do it, then it follows that their employees, agents or professional advisors cannot do it either.

There is also an argument that the heir hunter would be seeking to profit by taking advantage of information acquired in a fiduciary capacity, which could be an abuse of confidential information.

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The fact that some or all of the information provided might be discoverable in the public domain does not mean that the information was not confidential, if what gave rise to the opportunity to contact a beneficiary was the combined effect of being provided with initial information from a personal representative, leading to subsequent investigations based on this information.

Imagine a beneficiary who finds themselves contractually bound to lose a significant proportion of their inheritance, following a chain of events commenced by a personal representative who had a choice to do otherwise.

Perhaps this beneficiary was not told that the personal representative originally instructed the heir hunter, or they feel that they are somehow compelled to engage the heir hunter's services to assist the personal representative in 'proving' their entitlement.

If that personal representative could have instructed a genealogist on a reasonable hourly rate on behalf of the estate, which would have been significantly cheaper, then it is hard to see how the beneficiary could conclude that the personal representative acted in his or her best interests.

Genealogical research is a perfectly legitimate and sometimes necessary part of administering a deceased's estate.

Getting specialist help can save time and money, but make sure that you carefully consider who to use, how to pay, who will pay and whether this provides good value for the beneficiaries.

Did you know?

Title Research only charge on a fixed fee or time and expenses basis in order to maximise the estate for beneficiaries.

This offers our clients total transparency from the start and ensures more money is left in the estate when it matters.

- We can verify or fully reconstruct a family tree for the purpose of insurance
- We have located over 10,000 missing beneficiaries in the last 3 years, 2,000 of which were located overseas
- We can sell overseas shareholdings in multiple overseas jurisdictions
- We are one of the few companies outside of North America who hold a Medallion Signature Guarantee stamp in-house, allowing for fast-tracked transactions
- We regularly host free CPD webinars on the challenges faced when administering estates

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GILL STEEL DISCUSSES

Trusts distress

About Gill Steel

- Gill Steel is the director of **LawSkills** and a solicitor of high standing in the legal community.
- She is a member of the Society of Trust and Estate Practitioners (STEP) UK Practice Committee and the Association of Taxation Technicians.
- Her **website** provides articles and technical 'know-how' dedicated to the Private Client Practitioner.

"I hardly dare comment on the Trust Registration Service (TRS). As I write this piece many of you will be tearing your hair out to register all your existing trusts on the system by the 5 March 2018 deadline."

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I hardly dare comment on the Trust Registration Service (TRS). As I write this piece many of you will be tearing your hair out to register all your existing trusts on the system by the 5 March 2018 deadline.

Timelines

The TRS was necessary because of the coming into force of The Money Laundering, Terrorist Financing & Transfer of Funds (Information on the Payer) Regulations 2017 (4AMLR) on 26 June 2017. In theory TRS went live on 10 July 2017 but it was not available to professionals acting as agents for the trustees, only for trustees themselves.

9 October 2017

Guidance in the form of answers to Frequently Asked Questions were made available by HMRC to STEP and gradually other professional bodies. There is still no guidance on the .gov.uk web site.

17 October 2017

The gates were opened for Agents to access the TRS but in fact Agents could not access the system without an Agent Services Account.

22 November 2017

The guidance was updated to provide some workaround tools for dealing with classes of beneficiaries and deceased settlors but yet still complete a registration. These changes, particularly regarding classes of beneficiaries, has caused unnecessary work for firms which some feel they cannot charge to clients. In one example I have been told over £30,000 of work-in-progress is looking as though it will have to be written off.

Difficulties with Agent Services Accounts

It quickly became apparent that agents with no 'digital footprint' with HMRC struggled to get an Agent Services Account set up. Obviously, accountants used to filing clients' tax returns on line already did have a digital footprint but solicitors who had not previously filed online had to create a new Government Gateway account first in order to register for an Agent Services Account.

HMRC announced on 20 December 2017 that where new trusts needed to be registered by 5 January 2018 they would accept a paper registration and asked practitioners to request (via the trust and estate helpline on 0300 123 1072) a 'data capture sheet'. Some firms did not receive this in time to submit registrations of new trusts and complex estates by 5 January 2018. On 4 January 2018 HMRC conceded that those who had failed to register online could continue to use the data capture sheet until the matter was resolved.

On 8 January 2018 HMRC said the problem had been resolved and any agent who had previously had problems should try again. The problems still seem to exist if you have never had an agent code before or you have never acted as an agent before. You will still need to use the data capture form which will eventually result in you receiving a Unique Tax Payer's reference (UTR).

2017/18

The leeway on registration for 2016/17 will not apply. So the still to be finalised penalty regime will apply if you fail to register new trusts & estates by 5 January 2019 and update existing trusts.

Trusts are a muddle

If you need help with any aspects of Trust administration whether it be learning more training for the department in-house or just needing someone who can mentor you as you get to grips with the intricacies of Trusts, just call on LawSkills, we're specialists in Private Client training and consultancy.

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Testamentary capacity: But which test?

If a dispute arises about a person's testamentary capacity during their lifetime, this will be determined by the Court of Protection and the test will be that set out in section 2 of the Mental Capacity Act 2005 (MCA) (namely is the person at the material time unable to make a decision for himself (i.e. is unable to understand, retain, use or weight the relevant information, and communicate his decision – see section 3) in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

In James v James [2018] EWHC 43 (Ch) the High Court had cause to consider (again) what the correct legal test is when determining a dispute about whether a deceased testator had the capacity to make a will during his lifetime.

As the Judge noted at paragraph 68, the traditional test in such as case is laid down in Banks v Goodfellow [1870] LR 5 QB 549 at 565 by Cockburn CJ:

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

Guest contributor: Katie Scott

Katie Scott is a barrister at 39 Essex Chambers.

She specialises in Court of Protection work in health and welfare and property and affairs.

However, since the coming into force of the MCA there have been inconsistent judgments as to whether this common law test has been supplanted by the statutory test

- The Court of Appeal in the case of Simon v Byford [2014] EWCA Civ 280 held that the correct test was the common law test, but only because the will was made before the MCA came into force.
- In Walker v Badmin [2015] EWHC 71 (Ch), Nicholas Strauss QC sitting as a High Court Judge, having reviewed all the cases, concluded that the common law test was the sole test of capacity for determining will making capacity in retrospect, irrespective of when the will was made.
- Other Judges such as Lewison J in Perrins v Holland [2009] EWHC 1945 (Ch), and in Gorjat v Gorjat [2010] EWHC 1537, have come to the opposite view.
- HHJ Paul Matthews concluded that the correct test was the common law test. He did so on a number of basis including that:
- There is nothing in the MCA which suggests that it applies to judging capacity to make wills once they have been made and that the MCA is concerned with assessing the capacity of living persons;
- Banks v Goodfellow is not a recent innovation of the common law, and it is a principle of statutory interpretation that Parliament is assumed not to intend to overrule well-established rules of the common law without clear words, or at least necessary implication.

Does any of this matter?

In most cases, probably not, but there are real differences between the two tests which means that a will could be declared to have been made capacitously in a person's life time (pursuant to the MCA), only to be successfully challenged after the testator's death on the application of the Banks test. The differences between the two tests can be summarised as follows:

- Under the MCA there is a presumption of capacity (see section 1(2)) and the burden of proof is on the person disputing that P has capacity. When applying the Banks test however, although capacity will be presumed in cases where a duly executed will is put forward which is apparently rational on its face, it is only a presumption, and if a real doubt is raised about capacity, then it will be for the propounder to prove on the balance of probabilities that the maker of the will had testamentary capacity.

- The test under the MCA requires the testator to be able to understand, retain and use or weigh the relevant information. The Banks test does not require in all cases that he is able to remember and understand all relevant information.

- Lastly, the Banks test does not require the testator in all cases to understand, use or weigh information as to the reasonably foreseeable consequences of the choices open to him, whereas under the MCA it does.

What does all this mean for practioners?

First of all, an appropriate case needs to be appealed to the Court of Appeal for a definitive answer! Until then:

- When advising testators in circumstances where there is any doubt (or likely to be a dispute) about capacity, obtain evidence as to the testators capacity pursuant to both the statutory and the common law tests.

- When advising propounders or challengers to a will, pick the time at which to make the challenge carefully. It could be to your client's advantage to seek a determination of the dispute during the testator's lifetime in the COP, or it could be to your client's advantage to seek a determination of the dispute after the testator's death in the Chancery Division.

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Interesting case studies:
Repatriating assets

We obtained a reseal of a Grant of Probate in Hong Kong, to assist in the sale of two assets worth £75,000.

The shareholdings were listed on the Hong Kong stock market, which requires a Grant reseal before a sale or transfer.

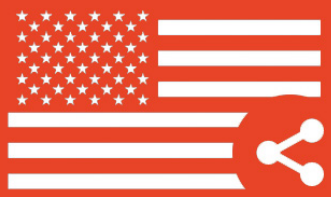
For a fixed price we liaised with our partners in Hong Kong to carry out the necessary legal work.

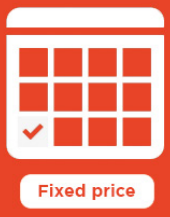
We recently helped a solicitor accurately distribute funds to a Russian education charity with links to the Bolshoi Theatre.

We received this great feedback:

"We must express our gratitude to you for your assistance in this matter, it has been invaluable and we are incredibly grateful."

We successfully sold a Kraft Heinz shareholding worth $15,000 on behalf of a UK estate.



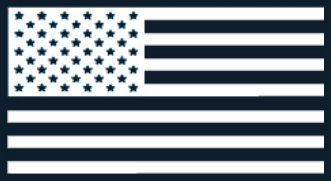


We completed all the paperwork and dealt with queries from the US registrars to enable the funds to be returned to the UK beneficiaries.

All within 10 months and for a fixed price.

We successfully sold a US Shareholding worth £4,000 in less than 4 months on behalf of a UK Solicitor.

The deceased owned shares in J P Morgan Chase.



For a simple fixed price we completed all the paperwork required to encash the shares & associated investment plan.

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Interesting case studies:
Genealogical research

Despite frequently occurring surnames, we successfully located 6 potential heirs to an intestate estate.

We arranged a comprehensive insurance policy to protect against any future claims.

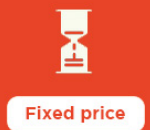
Our client said "Thanks for all your hard work and indeed keeping us appraised of developments"

We successfully helped our solicitor client resolve an intestacy matter, locating the two rightful heirs to an estate in Estonia.

Protecting the **Personal Representatives** from any future liability

In addition, we put in place an insurance policy to protect the Personal Representatives from any liability arising from any unknown heirs coming forward in the future.

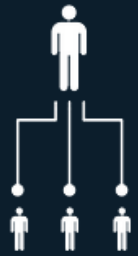
We successfully located a missing beneficiary in Australia who was named in the deceased's Will, but had relocated on a number of occasions since it was written.



Within one month of instruction we located the missing person, and undertook a bankruptcy search for complete peace of mind – all for a single, fixed price.

We located 102 potential heirs to a Scottish estate

Following in-depth research, we successfully located heirs in the UK, Canada, Germany, Spain, South Africa, Australia, USA & the Netherlands.



For a fixed fee, we produced a family tree & our client can now distribute the estate

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