Inheritance tax and the importance of well drafted wills, not DIY

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Taking a DIY approach to will writing is risky from a tax perspective, especially when considering the distinction between land and other assets in a partnership, explain Julie Butler, director and Libby James, associate at Butler & Co Alresford

The recent case of *Ingram* [2023] EWHC 1982 (Ch) has highlighted the problem of do-it-yourself (DIY) wills. Here, the successful claimants challenged the purported last will of their mother, Joanna Abraham, dated 8 August 2019 on the grounds of 'want of knowledge and approval'.

The 2019 will left nothing to Joanna's two children, Henrietta and Tom, instead her estate was left to her brother Simon Abraham, the first defendant, and a valuable book collection to his wife, the second defendant. Joanna's previous will, executed in 2008, had left her estate to be divided equally between the claimants.

The detail behind the case was that in 2019, Simon drafted a new will for Joanna using an online template. He claimed that he acted on her instructions though some may argue that he was motivated by self-interest. Joanna died in 2021 aged 58 after a long battle with cancer.

At the High Court, Judge Berkley ruled that the 2019 will did not achieve what Joanna Abraham wanted, which was to 'secure the benefit of her estate for her children, apportioned to reflect their lifetime gifts, and that that benefit and apportionment was to be entrusted to Simon to implement'.

The importance of the will as shown by other cases

The Courts do consider the terms of the will. In *Ham v Bell* [2016] EWHC 1791 (Ch) the Court took account of the parents' wills and noted that they had disposed of their interests in the farmland in their wills; bequests which would have been ineffective if the land had been a partnership asset. This was considered evidence that the land was not intended to be a partnership asset.

It is important to be aware of the key tax point that partnership property achieves 100% business property relief (BPR) for inheritance tax and non-partnership property only achieves 50%.

Therefore, to consider the tax position in more detail in the context of the will, it can be important, for tax reasons, to identify and distinguish between the land and other assets being used in a partnership.

If the farmland is partnership property or is owned by an individual partner who permits the partnership to use them, the value of land which is a partnership property should be reflected in the value of the business itself, or a share in it, which may qualify for the inheritance tax (IHT) BPR at the rate of 100% in sections 104(1)(a) and 105(1)(a) Inheritance Tax Act 1984 (IHTA 1984).

Tax implications

Without the review of the will by a professional it is hard to know if a will is valid or if the tax position is secure.

A well-written will can reduce the burden of inheritance tax (IHT) on the estate and also aid in tax planning. However, a poorly drafted will can have unintended consequences such as inadvertently creating trusts.

This will increase the administrative burden on the executors, as it may be necessary to register with HMRC's Trust Registration Service. If that trust is not managed professionally, there could be penalty payments and tax charges in closing it down.

For farming the case emphasises the importance of strong wills and IHT planning. With such high values in farms (and houses with land) it is essential that professionals protect those involved in will drafting and IHT planning.

There are many lessons to be learnt from this case which highlights the problem of wills prepared outside of the professional domain and protection.

Inheritance tax bill

A recent decision in the First Tier Tribunal, *N Hall and another (as trustees of Carolina Raboni deceased)* (TC8691), concerned whether an interest in possession arose in a 'cash poor' estate where a 'companion' occupied the house after the widow left her house to her five nieces and nephews.

The 'occupying beneficiary' was a companion who had supported and cared for the deceased. At the end of her life the companion was given a right to continue living in the house for as long as he wished.

When the widow died in 2004 the value of the house put the estate over the threshold for inheritance tax and there was a bill to pay of £15,600. Unfortunately, there was no money in the estate to pay it, so the executors consulted the beneficiaries and explained the legal position.

One way or another, the tax bill had to be paid. They had no unilateral power to mortgage the property and if they had they ran the risk of being sued for reducing the value of the property by burdening it in that way.

The tribunal was of the view that to decide what right the companion had under the will, it was necessary to consider what the executors could have done, in the absence of any consent by any of the parties.

Had they done nothing, the residuary beneficiaries could have compelled administration of the estate, and HMRC could have demanded the payment of their liability. The only option then would have been to sell the house and, in that case, there would be no interest in possession because the house was sold.

The executors believed the only option was to sell the property subject to the companion's right of occupation – which would impact on the open market value. Faced with this, and considering the wishes and intentions of the deceased, the beneficiaries opted to pay the inheritance tax bill themselves and to wait until the companion died before selling the property.

Tax professionals working together

This is a clear example of how tax advisers and will drafters must work together. Those drafting wills must consider the impact of future inheritance tax liabilities on the wishes of the testator and advise accordingly.

How the companion could live in the house with the creditor of the IHT liability should be considered in practical terms. It is surprising how often the will does not consider the practical reality of the administration of the estate.

By the time a large number of UK testators die the estates will be cash poor due to a combination of the cost of living crisis and care costs, and testator wishes must consider this. The companion being granted the right to live in the house rent free and just having to pay for insurance and maintenance costs is a 'grand gesture' that cannot always be fulfilled.

Mobile phones, social media and the impact on wills

Looking in more detail at the *Abraham* case, Simon Abraham argued that Joanna had asked him to prepare a will for her giving clear instructions to leave her estate to him and her books to his wife.

He used an online will kit to draft it, reading it out to her over the phone before sending her copies by both email and post. He then delivered a bound version of the will for her to sign which she both read herself and had read to her in front of her lodger, who gave evidence about this. Joanna had her lodger and a neighbour witness her signature. Simon asserted that Joanna had retained the signed will.

However, Henrietta and Tom were highly suspicious of the circumstances in which the 2019 will was prepared and executed, and used voice recordings of Joanna made prior to the 2019 will, and social media messages from before and after the 2019 will to support their concerns.

It is interesting to note the use of voice recordings and social media messages in current will disputes.

Simon's credibility and failure to disclose

In his defence, Simon explained that Joanna had given clear instructions on how she wished to leave her estate, claiming the reason she changed her will so dramatically was because she fell out with her children.

However, his credibility was damaged by inconsistencies in his evidence and his continued failure to disclose texts, call records, and other social media messages stored on both his and Joanna's mobile phones, as well as issues with the credibility of the witnesses he called to support his case.

As a result, the judge found that Joanna did not understand the effect of the 2019 will, and Simon Abraham had contributed to this misunderstanding.

The case is noteworthy for providing a careful analysis of how to apply to the test for want of knowledge and approval in *Gill v Woodall* [2011] Ch 380 and related case law.

DIY wills vs the professional will drafting

A DIY will can be legally binding if it follows the formalities set out in section 9 of the Wills Act 1837. Namely, it must be:

- in writing;
- signed by the testator (meaning the person making the will) in the presence of two witnesses; and
- signed by two witnesses in the presence of the testator.

If the testator cannot sign, then someone else can sign on their behalf, but this must be done in the presence of the testator and the witnesses at the testator's direction. There are also strict rules around who can be a witness.

This may give the impression that DIY wills have more strength than they do in reality, especially when lots of 'write your own will' services have glowing reviews online. However, the will cannot be tested until the testator has passed away, at which point a number of problems may arise. If so, then the positive review seems a little premature and entirely unfounded.

A qualified will drafter will ensure that the necessary formalities are carried out correctly, offering guidance through a process which can often be emotional. They can help obtain medical capacity assessments where necessary to ensure there is full understanding and to reduce the chances of a successful challenge to the will in future. They can also advise on putting in place lasting powers of attorney.

In contrast, the danger of DIY wills is that they may not cover all eventualities, nor reflect the clients' intentions nor fully take account of tax. There is also the risk of fraud and abuse by unscrupulous family members which professionals can help mitigate.

It is therefore advisable to always use a professional to prepare a will, even if the circumstances appear to be relatively simple.

The vulnerability to fraud and abuse of DIY wills

With DIY wills the sad fact is that clients may be more susceptible to the possibility of undue influence and fraud. With an ever-increasing number of people suffering from Alzheimer's disease and similar age-related illnesses affecting mental capacity, the opportunity for fraud and/or abuse via the use of DIY wills is obvious. The wealthy and vulnerable must be protected.

Professional will advisers should be alert to any signs of undue influence or coercion in the context of a testator's instructions for their will.

Meeting with a new client can be invaluable in establishing whether there is any undue influence or duress and to ensure that the instructions for the will come solely from the client, independent of any third party.

File notes of these meetings could be used in evidence if a dispute were to arise and therefore maintaining and retaining detailed file notes is key. Indeed, a good will file is as important as the ability to produce a *Larke v Nugus* statement.

When an elderly or vulnerable client makes a DIY will, these safeguards cannot be replicated and tax planning must always be considered.

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