

TECHNICAL ADVICE

FROM
THE IPW TECHNICAL PANEL



RISK MANAGEMENT IN YOUR BUSINESS

British law has as one of its foundations the principle of freedom of testamentary disposition. In plain English, this has widely been translated as “you can leave what you want to who you want on whatever terms...or leave someone out”.

Although the same doctrine applies in Scotland, it does not necessarily produce the same outcome: certain family members can claim certain inalienable inheritances (called legal rights) even if they have been completely excluded from a testator’s Will.

Most Will arrangements leave inheritances broadly within a settled family or friendship structure. And those are the straightforward cases.

But how do we manage cases where, say, the parents want to exclude one of the children? Or the client wants to leave a substantial legacy to their carer? Writing the Will is often relatively straightforward but it’s easy to think that when the client has signed that Will and it’s been witnessed and the fees paid, that the work is completed.

It isn’t.

One of the most important elements of the Will writers’ job is to ‘crystal-ball gaze’ and risk manage how their case could be challenged by an excluded beneficiary once the client has died, and build that protective file around the case.

YOUR INSTRUCTION FORM ALMOST CERTAINLY WON’T BE SUFFICIENT

Very generally speaking, an instruction form is merely an order from the client. It describes who the client wants to appoint as execs, who is to inherit what and the terms of whatever trust might be included. They’re placing an order as to what should be included in their Will; that’s all.

It almost certainly (and there’s no excuses if it doesn’t!!) ask if the client can read their own Will and sign it using their normal signature, but the form itself usually makes no reference to the circumstances around the exclusion, or the discussion points in the meeting.

CHANGING YOUR VIEWPOINT

Let's play a game.

Imagine through your letterbox you've received a letter. It states something like this:

"Dear Will Writer,

In 2020, you prepared a Will for Mrs X who has subsequently died. I understand from my client that the Will you drafted failed to include my client as a beneficiary, who was much loved by her and cared for her in her last days.

I further understand that the beneficiary of Mrs X's Will was in attendance with you at the meetings.

Could you please provide your client file".

So, what's the purpose of the letter sent by the solicitor? Clearly the overall objective from their point of view is find whether there might be a way to invalidate the Will or planning put in place by the Will writer for their client.

So the file needs to determine whether amongst many other elements:

The client gave instructions of their own free Will

The client demonstrated testamentary capacity

And of course, if the file cannot demonstrate these elements, then the validity of the Will could be called into question, or an allegation that incorrect advice was provided to the client.

NOTE: it doesn't mean the Will writer has made a mistake; merely they need to be able to evidence no mistakes had been made.

WHAT WAS THE CASE OF LARKE V NUGUS ALL ABOUT?

The phrase, **Larke v Nugus**, originates from a legal case of the same name, that determined the law on requests for information regarding the circumstances surrounding the instruction and execution of a will *Larke v Nugus* [2000] WTLR 1033.

Over time, it's become the go-to process, and also sets out the minimum standard of what would be expected from a client file. Importantly, the implication is if a file is not Larke v Nugus compliant, it may not be sufficiently comprehensive enough to protect your clients interest....nor that of the Will writer from an allegation of negligence.

WHAT DOES LARKE V NUGUS EXPECT, OVER AND ABOVE YOUR INSTRUCTION FORM?

Back to our game. We've already established that the instruction form may not contain all relevant information relating to the MANAGEMENT of the case from beginning to end. So, does the client file for our mythical challenger contain the following information?

Larke and Nugus	
How long had you known the clients	
How did you come across them as clients (referral, phone call?)	
Date instructions received	
Case files:	
Records of attendance, meeting notes, phone calls, emails?	
Previous Wills – why the change? Pattern of previous changes?	
Who else was present at the meetings	
Any evidence of undue duress or influence – yes or no/ describe	
Physical health of client – describe	
Concerns about memory loss, confusion, etc.? Yes or no	
Any need for urgent processing – poor health, holidays, etc.?	
Was the instruction taking:	
Face to face (yes or no)	
Phone (yes or no)	
Visual Zoom/Skype, etc. (yes or no)	
Drafts:	
Draft Wills sent and approved	
Will explained to client(s) to their satisfaction	
Attestation:	
Execution personally supervised (yes or no)	
Execution by visual Zoom/Skype, etc (yes or no)	
If by post, were attestation instructions sent (yes or no)	
Will returned for checking & approved for names and signatures	

Does this look familiar? If so, it's taken directly from the IPW instruction form (you can download and personalise it to suit your needs from the IPW Members area on your dashboard – see www.ipw.org.uk).

Note that a Larke v Nugus file also includes notes on all meetings, phone calls, emails, and details of who attended, etc. And crucially capacity establishment by a mental capacity expert is a distinct risk factor, along with undue duress.

WHAT DOES IT ALL MEAN FOR ME?

Can you remember a case you've managed in the past, where there was some thing out of the ordinary; in particular a family member being excluded? Perhaps the client had flaky capacity?

We're all (hopefully!) very busy right now, but it's an invaluable exercise to step back from the day to day work, and spend some time doing the following:

Look at that selected file through the lens of a Larke v Nugus enquiry popping through your door. Does it answer all those questions listed above?

If not, what crucial elements are missing?

Are there elements of your client processes or documentation you need to change to close some loopholes?

Remember, challenges are rare, but sadly are increasingly more common: we're a more litigious society now. And again, remember relatively few challenges are taken further due to the quality of the response to the challenger.

However, where those challenges do result in further action, a good client file will go a long way to protect yours and your clients interests.

One final point. As with any 'claim' made, it's the insurers who are the primary point of contact between the parties. In all circumstances, always speak with your insurer first and be directed by them in terms of how to deal with the enquiry.