Radcliffe Chambers
11 New Square Lincoln's Inn
London WC2A 3QB

T: 020 7831 0081
E: clerks@radcliffechambers.com
W: radcliffechambers.com

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No contest clauses and the Inheritance (Provision for Family and Dependants) Act 1975

Charles Holbech

Call: 1998

Barrister

Charles Holbech specialises in private client work, both contentious and non-contentious, often involving technical advice on tax, trusts and estates. He is recognised by Chambers UK Bar, Chambers HNW and The Legal 500 UK Bar as a leading junior for Chancery and private client work. He has edited Halsbury's Laws of England on Inheritance Tax and contributed the chapter on Taxation in Williams, Mortimer & Sunnucks, Executors, Administrators and Probate.

Introduction

A testator may be advised to:

(a) make limited provision for a person who may have a claim under the 1975 Act by way of a legacy, or share of residue, or as the beneficiary of a trust; and

(b) include a no contest, or forfeiture, clause to the effect that any beneficiary who brings a claim under the 1975 Act shall be excluded from benefit.

Standard precedents

Practical Will Precedents, Precedent F14e provides:

1. *I declare that any person who would otherwise benefit under my Will but who*

    1.1 institutes any proceedings to set aside or contest the validity of my Will or any provision of it;

    1.2. lodges any formal objection to the probate of my Will; or

    1.3. brings any claim under the Inheritance (Provision for Family and Dependants) Act 1975 in respect of my Estate

shall forthwith be excluded from receiving any benefit under my Will and my Will shall take effect as if no provision had been made to benefit that person.

The Encyclopaedia of Forms and Precedents, Vol. 42(1), Precedent 129, is as follows:

In the event that any of the beneficiaries under this will dispute the validity of this will or make any claim against my estate whether under the Inheritance (Provision for Family and Dependants) Act 1975 or any re-enactment or statutory modification of it or otherwise (save in respect of any debt owed to that person by my estate at the date of my death) the beneficiary's entitlement under this will shall be forfeited and shall fall into the residue of my estate.

Gift over

In the precedents set out above there are directions that the Will shall take effect as if no provision had been made for the beneficiary, or that the beneficiary's entitlement under the Will should be forfeited and fall into residue. That is sufficient to satisfy the requirement that a forfeiture clause will only be valid if there is a gift over. A residuary gift by itself is not equivalent to a gift over. However, a direction that, on breach of the condition, the legacy is to fall into residue would be sufficient.

The general principle is that a no-contest clause will only be valid if it provides that the benefit shall pass to someone else on forfeiture. If there is no gift over, the primary gift will be subject to an impermissible in terrorem condition imposed in order to induce the beneficiary not to contest the Will on pain of receiving nothing. However, where there is a gift over, the gift over will provide sufficient evidence that the testator's intention was not merely to threaten the donee by imposing the condition, but to make a different disposition in favour of another beneficiary in the event that the condition is not satisfied (see *Cooke v Turner* (1846) 15 M & W 727, approved by the Privy Council in *Evanturel v Evanturel* (1874) LR 6 PC 1).

Ouster

A clause purporting to bar a beneficiary from making a claim under the 1975 Act is ineffective, being contrary to public policy, and as amounting to a direct attempt to oust the jurisdiction of the court.

However, as will be seen, it is legitimate to impose a condition that a beneficiary's interest shall be forfeited if the beneficiary makes a claim challenging a Will, including a claim under the 1975 Act. The beneficiary is not barred from making a claim. The court's jurisdiction is not, therefore, ousted. However, the purpose of the no-contest clause is simply to provide a disincentive to bringing a claim. The claimant beneficiary runs the risk, by bringing a claim, of being left with nothing, or less than their entitlement under the Will.

As an extra disincentive, the testator may provide that, in the event of a claim by B, the interests of others (C and D) will also be forfeited. This is legitimate (see *Nathan v Leonard* [2003] 4 All ER 198 where the interests of other beneficiaries, including charities, were liable to be forfeited following a claim by the testatrix's son).

Authorities establishing validity of no-contest clauses

There is only one decision of the English courts which addresses the interaction between no-contest clauses and 1975 Act claims: *Nathan v Leonard* [2003] 1 WLR 827. This was a decision of John Martin QC (sitting as a Deputy Judge of the High Court). The clause in question was held to be void for uncertainty. However, it is clear from the judgment that, if the clause had been sufficiently certain, the court would have upheld its validity. The decision is not, as such, binding, as the Judge's comments were obiter, and the judgment was at first instance. However, the reasoning is persuasive.

There are two Commonwealth cases (*Re Gaynor* [1960] VR 640 and *Re Kent* (1982) 139 DLR (3d) 318) where the court had concluded, in the context of claims under legislation similar to that under the 1975 Act, that no-contest clauses were void on the grounds that their object and effect was to deter the beneficiary from having recourse to the courts in a matter in which it was in the public interest that there should be such recourse.

There are two recent Cayman Island cases: *AN v Barclays Private Bank and Trust (Cayman) Ltd* (2006) 9 ITELR 630 and *AB v MB* [2013] (1) CILR 1 which, in general terms, support the proposition that no-contest clauses are capable of being valid. However, these decisions were of a foreign court and did not apply English law. They also related to the effect of no-contest clauses in the case of challenges by beneficiaries to the validity of lifetime settlements, or to the decisions of trustees, rather than to claims under the 1975 Act.

Nathan v Leonard

In Nathan v Leonard the testatrix had a half share in her home ("the Property"), which she shared with her

friends, Sally and Paul Leonard. By her Will and 1st Codicil, she directed that the Leonards be entitled to occupy the Property for as long as they wished. She directed that her residuary estate (including her half share in the Property, subject to the Leonard's right to occupy) be divided into 3: 2/3 for the Leonards and 1/3 being held on discretionary trusts for her son, Andrew, his children and remoter issue, and two named charities, of which MIND was one.

By a 2nd Codicil the testatrix expressed her wish to bequeath all her real and personal property, including her beneficial share in the Property, to the Leonards, should the family members or the charities "wish to contest or disagree with my will". In that event she wanted the provision for the Leonards to override everything previously stated in her Will.

She went on to state in the 2nd Codicil: "This clause cannot be superseded, and will only come into being if at any time during the life of the trust or up to 80 years has elapsed".

Andrew commenced proceedings under the 1975 Act. It was in the interests of the Leonards to argue that the forfeiture clause had been triggered by the issue of proceedings, in which event they became entitled to the whole estate. It was in the interests of the charities to argue that the original dispositions of the Will should stand, and MIND was joined to the proceedings to make that argument. Andrew's position was largely neutral. Whether or not the forfeiture clause was triggered, his case was that the testatrix had failed to make reasonable provision for his maintenance.

The court had to determine, as preliminary issues: (a) whether the forfeiture clause was valid in law; (b) if so, whether there had been a breach of it; and (c) if so, the effect of the gift over ("I give … 80 years has elapsed").

Validity of the condition: repugnancy and caprice

John Martin Q.C. accepted that a condition to the effect that a beneficiary who challenges a Will loses the benefits given to him by the Will is, in principle, valid, at least where there is a gift over.

However, the relevant condition did not just deprive the person who challenged the Will, i.e. Andrew, of the benefits he would otherwise have received: it deprived all beneficiaries, other than the Leonards, of their interests. The charities, who had not mounted any challenge to the Will, would lose any possibility of benefit from the estate.

MIND contended that the wider effect of such a condition verged on the capricious, and such as to make the condition void for repugnancy.

John Martin Q.C. did not accept that the condition in question was repugnant to or inconsistent with the nature of the gifts made by the Will. A condition is void if it is inconsistent with, or repugnant to, the nature of an interest given to the donee, such as a condition that purports to impose restrictions on the alienation of property given absolutely, or that purports to forfeit property in the event of the donee's bankruptcy. However, a condition purporting to divest a testamentary gift, if the donee disputes the Will or brings a claim under the 1975 Act, is not void as being repugnant to, or inconsistent with, the gift. There is only an inconsistency if the condition purports to limit or remove the incidents of ownership which necessarily attach to the gift, as where the condition operates if the donee wishes to sell the property given to him. Having given the property absolutely, the testator cannot control what the donee does with it.

There is, in contrast, no inconsistency in making a gift, and at the same time imposing a condition that the gift shall be divested on a specified event, such as the making of a claim. Such a condition attacks the whole gift, rather than merely the incidents of the gift, and does not have the same inconsistency. On that basis, it makes no difference if other gifts by non-claimants are divested too.

A condition, which purports to forfeit not only a 1975 Act claimant's interest, but also the interests of other beneficiaries, in the event of a 1975 Act claim being made, is, therefore, not invalid on the grounds of repugnancy.

Nor, as John Martin Q.C. determined, is such a condition void on the grounds of caprice. A testator may also dispose of their property as they wish, however capriciously.

Public policy

John Martin Q.C. went on the consider the argument that a forfeiture clause, triggered by a 1975 Act claim, was invalid as being contrary to public policy.

He held that the forfeiture of a testamentary gift in the event of a claim under the 1975 Act is not contrary to public policy. The condition does not prevent the beneficiary from making a claim under the 1975 Act: the beneficiary has an enforceable statutory right whether the condition operates or not. Moreover, if the beneficiary forfeits their interest, that is a matter that can be taken into account by the court in exercising its jurisdiction under the 1975 Act. The fact that such conditions may present applicants with difficult choices is not an adequate ground for holding them void on public policy grounds.

This conclusion was doubted (in respect of claims for reasonable financial provision) by Chief Justice Smellie of the Grand Court of the Cayman Islands in *AN v Barclays Private Bank and Trust (Cayman) Ltd* (paras. [86] to [88]). The Chief Justice noted that the Judge's comments on public policy in Nathan v Leonard were obiter.
Ross, Inheritance Act Claims, 4th Ed., para. 4-102 ventures the opinion that it is against public policy to permit persons to make their own private law by excluding or hindering others from availing themselves of their statutory rights.

Nonetheless, the likelihood is that the English courts would follow Nathan v Leonard in concluding that a no-contest clause designed to deter claims under the 1975 Act is not void on the grounds of public policy. That is consistent with testamentary freedom, and does not have the effect of debarring, only deterring, an applicant from enforcing their statutory rights. There is also some support for the validity of no-contest clauses in the Privy Council's decisions in *Cooke v Turner* (1846) 15 M&W 727 and *Evanturel v Evanturel* (1874) LR, 6 PC 1.

Uncertainty

In *Nathan v Leonard* the clause in question was held to be invalid on the basis of uncertainty.

A no-contest clause will be invalid if its terms are too uncertain to be enforced. Conditions of defeasance, in order to be valid, should be so framed that the persons affected (or the court if they seek its guidance) can from the outset know with certainty the exact event upon the happening of which their interests are to be divested.

In *Nathan v Leonard* the Will stated that the no-contest clause "will only come into being if at any time during the life of the Trust or up to 80 years had elapsed". It was clear that some words, possibly imposing a new requirement, had been mistakenly omitted after "and will only come into being if". Since it was impossible to say what the omitted words were, the condition failed for uncertainty.

A standard precedent to the effect that a beneficiary, who brings a claim under the 1975 Act, forfeits their interest is not uncertain.

Trigger event

The trigger event must not, however, be uncertain. In *Nathan v Leonard* the forfeiture was triggered "should they wish to contest or disagree with my will". John Martin Q.C. asked a series of questions: Is it enough that someone should want to contest the Will, without actually doing anything about it? Is it enough that someone should disagree with the way in which the testatrix dealt with her estate, again without doing anything about it? What if the disagreement is taken to the extent of a letter before action, but no further?

The Judge concluded that these apparent difficulties lacked reality. It could not be supposed that the testatrix intended to forfeit the interest of anyone who harboured, however secretly, the view that she had dealt with her estate unfairly: her objective was to deter anyone from taking steps to alter the disposition she had made. Construed in that light, the words "wish to" added nothing to the words "contest or disagree"; and the latter words encompassed any proceedings which might result in an alteration of the dispositions made by the Will and first Codicil.

Threats would not be enough, nor a letter before action. However, proceedings challenging the Will on the ground of lack of capacity, want of knowledge and approval or undue influence would be. So also would a claim under the 1975 Act, since it would have the potential to bring about a redistribution of the estate.

In Nathan v Leonard the testatrix's son, Andrew, had commenced proceedings under the 1975 Act. That amounted to a contest or disagreement with the Will. On the face of it, that meant that by commencing proceedings Andrew would, if the condition had been valid, have brought about a forfeiture of all the dispositions made by the Will and the first Codicil.

Comments on trigger event

It follows that a standard precedent providing for forfeiture in the event of a challenge to the Will and/or a claim under the 1975 Act would not be void for uncertainty; and that it would not be triggered unless a claim form is actually issued.

A forfeiture clause is construed strictly against the person seeking to uphold the clause. Therefore, it is unlikely that a forfeiture would be triggered by pre-action conduct unless that is clearly stated.

A forfeiture clause will not, therefore, bite as a result of a beneficiary's conduct prior to the issue of proceedings if the trigger event is expressed to be:

(1) the taking of any steps whatever (whether directly or indirectly) by a beneficiary to contest the Will. The forfeiture will be construed as taking effect when legal proceedings are commenced in which the Will is contested *(Evanturel v Evanturel*, (1874) LR 6 PC 1 at 22, cited in *AN v Barclays Private Bank and Trust (Cayman) Ltd* (2006) 9 ITELR 630 at [51]).

(2) a beneficiary contesting, disagreeing with, or challenging the Will.

(3) a beneficiary wishing to contest, disagree with, or challenge the Will.

The testator could, however, specifically provide that a beneficiary's interest will be forfeited in the event that there is a letter before action, or some other preliminary step is taken advancing a claim under the 1975 Act. This would, it is suggested, be counter-productive. A reasonable settlement, or an abandonment of the claim, is more likely to come about if the potential claimant is free to advance a claim without risking the forfeiture of their interest. It may also give rise to issues as to what a "letter before action" means. Would it include any letter expressing dissatisfaction with the provision made by the Will?

Unsuccessful claims

In Nathan v Leonard it was submitted on behalf of MIND that there should only be a forfeiture if Andrew's claim was unsuccessful. This contention was, however, rejected.

The Judge expressed the view that there is no rule of law that forfeiture conditions only apply to unsuccessful challenges. There may be cases where it is possible to construe a no-contest clause as applying only to unsuccessful challenges, but only if there were wording to that effect. If not, the condition must take effect whether the challenge succeeds or fails. To construe the relevant condition as confined to unsuccessful challenges. Accordingly, the effect of the condition was not dependent on the success or failure of Andrew's claim, and the bringing of the claim would have operated the condition had it been valid. A successful claim under the 1975 Act does not invalidate the Will, and thus leaves the no-contest clause intact.

In *AN v Barclays Private Bank and Trust (Cayman) Ltd* it was held that a no-contest clause was to be construed, in accordance with Cayman law, as ineffective, where the claim was "justifiable", i.e. where it is made bona fide and with reasonable cause, as opposed to where it is frivolous and vexatious. Conversely, a forfeiture clause would be effective if, but only if, the claim is unjustifiable. The same approach was taken in AB v MB.

This distinction between justifiable and non-justifiable claims makes sense where the no-contest clause purports to forfeit the interest of any beneficiary of a trust who seeks to enforce their rights under the trust. It would be harsh, and inconsistent with a beneficiary's rights, to forfeit the beneficiary's interest for having brought a justifiable claim to enforce the rights derived from that interest.

The same issue does not arise in the case of a 1975 Act claim: the no-contest clause does not purport to prevent a beneficiary from enforcing the core duties of executors or trustees. If the beneficiary brings a successful claim, they may obtain a substantial award from the court, notwithstanding the no-contest clause.

In conclusion, it is likely that an English court would, following Nathan v Leonard, decide that a clause forfeiting the interest of a beneficiary who brings a claim under the 1975 Act will operate even if the beneficiary succeeds in their claim, or had a justifiable claim.

Gift over

It has already been noted, above, that a no-contest clause will only be valid if there is a valid gift over.

In Nathan v Leonard the 2nd Codicil in question unambiguously provided that two individuals (the Leonards) should become entitled to the testatrix's entire estate in the event that the Will was contested. There was, therefore, a valid gift over.

Relief from forfeiture

In *Nathan v Leonard* the forfeiture affected not only the interests of the claimant who had brought a claim, but also the interests of charities who had not brought a claim. It was submitted on behalf of MIND that relief from forfeiture was available and should be granted to those beneficiaries (such as the charities) whose interests would be forfeited through no fault of their own.

The Judge assumed that relief from forfeiture was available in favour of beneficiaries whose interests would be forfeit through no fault of their own. Indeed, relief will not be granted to a beneficiary who has caused the forfeiture by bringing a claim (*AN v Barclays Private Bank and Trust (Cayman) Ltd*, paras. [119], [122], and [123]).

In Nathan v Leonard the Judge nonetheless declined to grant relief on the basis that to do so would involve real damage to the testatrix's intentions. The testatrix intended that if anyone challenged the Will, all the beneficiaries, other than those entitled on forfeiture, would be dispossessed. She, therefore, clearly contemplated that some beneficiaries would lose their interests as a direct result of someone else's action over which they had no control. Moreover, relief would require a major and impermissible rewriting of the Will, preserving some parts, and introducing new parts.

The Judge did, however, leave open the possibility of relief for an innocent party where the forfeiture appears to have been unintended by the testator.

Conclusion on no-contest clauses

A standard no-contest clause, taking effect if a beneficiary challenges a Will or brings a 1975 Act claim, will be effective. It will apply whether the claim is successful or unsuccessful, justifiable or unjustifiable. Such a clause will not be void for uncertainty, if properly drafted. It will generally be triggered by the issue of proceedings under the 1975 Act. It will not be invalid as having been imposed in terrorem, provided that there is a gift over.

The clause will not be repugnant to the gift of the beneficiary's interest, since a gift may be divested. Nor will it be contrary to public policy, since the beneficiary will not be debarred, only deterred, from bringing proceedings under the 1975 Act.

Generally speaking, therefore, it will not be possible to circumvent a properly-drafted no-contest clause.

Acting for a potential claimant

Unless the no-contest clause specifies that a beneficiary's interest is forfeited by a letter of claim, or by some preliminary step to bringing a claim, the trigger event will be the issue of proceedings.

On that basis there should be no objection to a letter of claim being sent on behalf of the beneficiary. Nor should there be any objection to WPSAC correspondence prior to the commencement of a claim. The letter of claim would assert that the provision made by the Will is unreasonable, and even more so if it is forfeited. Any WPSAC offer of settlement would be put forward on the basis that the claimant receives an award which is more valuable than their existing benefit.

However, once a claim is made, a standard no-contest clause will be triggered. If a settlement is to be effected by a consent order under the 1975 Act (which may be tax-efficient having regard to the retrospective effect of IHTA 1984, s. 146) this will involve the commencement of proceedings, and the forfeiture of the benefit under the Will.

It would represent a significant, and potentially costly, gamble for a potential claimant to seek to challenge the validity of a no-contest clause, by way of a preliminary issue, unless its terms are uncertain (which should not be the case with a standard clause). The most relevant authority (Nathan v Leonard) confirms that no-contest clauses are unobjectionable in principle.

Weak or doubtful claims

There is a clear risk to a potential claimant if a claim is made under the 1975 Act in the face of a no-contest

clause. The applicant may end up with nothing, if the claim fails, or less than the value of their benefit under the Will. In either case, the claimant would no doubt be liable to pay their own costs and the costs of the defendants. The testator may have left a Will conferring a life interest on a cohabitee or dependent in the home that they had shared with the deceased. Alternatively, the testator may have provided a not ungenerous legacy for the accommodation needs of the cohabitee or dependent, in the form a lump sum to fund rent or to put down a deposit on another property. In both cases, the testator could provide that the claimant's entitlement shall be forfeit in the event of a claim under the 1975 Act.

Approach of courts

There is no decided case in which the court has had to consider the correct approach in such cases. The starting point must, however, be for the court to determine whether, having regard to the facts known to the court at the date of the hearing (s. 3(5) of the 1975 Act), the Will fails to make reasonable financial provision for the claimant (at the maintenance or spousal standard, as applicable).

If there is no challenge to the validity and application of the forfeiture clause, the court must ask itself whether it is unreasonable that nil provision should be made for the applicant. However, the court would also take into account the fact that, had there been no claim, the claimant would have been entitled to the provision made by the Will.

What would the court's approach be if the provision made by the Will, without the application of the forfeiture clause, was not unreasonable? The court might:

(1) dismiss the claim, awarding nothing to the claimant on the basis that the claimant could have accepted reasonable provision, but chose to take the risk, in the face of a no-contest clause, to ask for more. The other beneficiaries have been put to expense, and the administration has been delayed. Therefore, it is not objectively unreasonable for the claimant to receive nothing, or only a much-reduced award, and that they be ordered to pay the defendants' costs.

(2) determine that nil provision is unreasonable, having regard to all the statutory matters to be taken into account, including the nature and extent of the obligations owed to the claimant, and the claimant's financial circumstances. The court might, however, consider that the claimant's entitlement under the Will, disregarding the forfeiture clause, would amount to reasonable provision; award the same or similar amount to the claimant; but order the claimant to pay the costs of the defendants.

Either way, there is a considerable risk to the claimant, unless the provision is so low that the prospect of its loss is no great deterrent, and there is a very real chance of obtaining a greater award by pursuing the claim.

Strong claims

A no-contest condition will be no great deterrent in the case of a strong claim, where the realistic value of the claim exceeds the benefit under the Will.

The applicant may be a spouse, with significant capital and income needs, entitled to reasonable provision not limited to maintenance. The Will may only make provision for the spouse, limited to strict maintenance needs, e.g. by way of a life interest. The primary beneficiaries of the Will may be the deceased's children by a previous marriage, all of whom are financially secure.

A no-contest clause would not, in these circumstances, provide much of a disincentive to the surviving spouse not to bring a claim. The spouse is likely, on any basis, to better their entitlement under the Will and (subject to any WPSAC or Part 36 offers) to obtain an order as to costs against the defendant beneficiaries.

Claims by estranged adult children

It would not be standard practice to include a no-contest clause in a Will unless there is an identified person who, it is anticipated, may make a claim under the 1975 Act.

This might be the case where there is an adult child who is estranged from the testator, where the testator does not wish to make any provision for that child, or only the most limited provision.

In essence, this was the position in *Illott v Mitson* where an adult daughter, in financial need and in receipt of state benefits, was awarded by the District Judge £50,000 (capitalised maintenance) from her mother's estate of

£486,000. They had been estranged for 26 years. The main reason for the estrangement was that the mother disapproved of her daughter's choice of partner, and also that the daughter did not work and lived off state benefits. The daughter was left nothing.

The District Judge's decision that the Will did not make reasonable provision for the daughter's maintenance was upheld: he had made a not-unreasonable value judgment that the daughter was entitled to make her life with a partner of her choice. In the Supreme Court, the quantum of the award of £50,000 was upheld, as also not being plainly wrong.

However, the protracted litigation in *Illott v Mitson* indicates that there is considerable uncertainty as to the outcome of such claims. In the Supreme Court ([2018] AC 545) Lady Hale expressed the view, at para. 65, that a respectable case could be made for at least three very different solutions open to the District Judge at first instance:

(1) He might have declined to make any order at all. The applicant was self-sufficient, albeit largely dependent on public funds, and had been so for many years. She had no expectation of inheriting anything from her mother. She had not looked after her mother. She had not contributed to the acquisition of her mother's wealth. Rather than giving her mother pleasure, she had been a sad disappointment to her. The law has not, or not yet, recognised a public interest in expecting or obliging parents to support their adult children so as to save the public money.

(2) He might have decided to make an order which would have the dual benefits of giving the applicant what she most needed and saving the public purse the most money. That is in effect what the Court of Appeal did, by ordering the estate to pay enough money (£143,000) to enable her to buy the rented home which the housing association was willing to sell to her and a further lump sum (£20,000) to draw down as she saw fit in such a way as to avoid any impact that the award had on her benefit entitlement.

(3) He might have done what in fact he did for the reasons he did. He reasoned that an income of £4,000 per year would provide her with her "share" of the household's tax credit entitlement and capitalised this in a rough and ready way, taking into account some future limited earning potential, at £50,000, notwithstanding that she would lose her entitlement to housing benefit so long as she retained capital in excess of £16,000.

In short, the claimant might have received:

(a) nothing; or

(b) an award worth £163,000; or

(c) £50,000 (as she did).

What if the testatrix had provided for a legacy to her daughter of £50,000, or thereabouts, and included a no-contest clause in her Will?

There was a very real chance that the daughter's claim would fail, and that she would receive nothing, or that she would only receive £50,000. In either event, she would have lost her legacy of £50,000. The risk of such a loss might have provided some disincentive not to bring proceedings, and to accept a legacy of £50,000.

However, the daughter appealed the District Judge's award of £50,000. Offers of settlement were not accepted following that appeal. It is, therefore, unlikely that the daughter would have accepted a legacy of £50,000, especially since the award affected her entitlement to state benefits.

From the testatrix's perspective, she did not wish to leave her daughter anything. She attached a letter to her Will stating that she felt no moral or financial obligation to make any provision for her daughter. She might well, therefore, have rejected advice to give a legacy of £50,000 to her daughter, even if that legacy were liable to be forfeited if the daughter brought a claim for more than £50,000. At best, the testatrix might have been persuaded to make a small legacy (say £20,000) coupled with a no-contest clause.

However, the inclusion of a forfeitable legacy of £20,000 might have backfired. The District Judge concluded that it was unreasonable for the testatrix to have cut out her daughter simply because she disapproved of her daughter's choice of partner. The inclusion of a small legacy, coupled with a no-contest clause, might have been seen as further evidence of unreasonableness or vindictiveness, and as an exacerbating factor.

If the testatrix had increased the forfeitable legacy to, say, £50,000, this might have undermined the testatrix's

claim that she owed no obligation to her daughter, and that her daughter had no expectation of benefit. The existence of such an obligation is a material factor under s. 3(1)(d) of the 1975 Act. The District Judge might then have tempted to go straight to the issue of quantum, perhaps awarding the daughter more than £50,000. As it was, he limited the award to £50,000 taking into account the claimant's lack of expectation of benefit from her mother's estate.

Other cases

In *Re Nahajec* [2017] WTLR 1071 the testator left nothing to his estranged daughter, and the court awarded her £30,000 concluding that the lack of relationship between father and daughter was not for want of trying on the daughter's part, and that the father had been stubborn and intransigent. There would have been little point in giving a legacy of, say, £10,000, and including a no-contest clause in the Will. Its inclusion would have been further evidence of intransigence.

In *Wellesley v The 8th Earl of Cowley* [2019] EWHC 11 (Ch) the testator left a legacy of £20,000 out of an estate of £1.3m to his estranged adult daughter. In a previous Will he had made the legacy conditional upon the Will not being challenged by the daughter or any other beneficiary. In his last Will he removed that condition.

The Judge found that the daughter was responsible for the long estrangement and that her legacy of £20,000 represented reasonable provision for her maintenance. The result would have been the same whether or not there was a no-contest clause; but its removal at least indicated a degree of reasonableness on the father's part. He must have been content enough to give a small legacy to his daughter on the basis that it was more than she deserved, but that he was prepared to be magnanimous in giving her something.

The inclusion of a forfeiture clause would not have deterred the daughter from bringing her claim. Her claim was quantified at 10-13% of the estate of £1.3m, and £20,000 would have made little difference to her as she was unable to work due to ADHD and she had a number of financial needs. For all these reasons, there would have been little point in including a no-contest clause in the Will.

In *Miles v Shearer* [2021] EWHC 1000 (Ch) claims by two adult daughters were dismissed primarily on the basis that they had received substantial lifetime gifts from their father with the clear message that they could expect no further financial assistance from him. The father's Will made no financial provision for his daughters. Having disclaimed any responsibility to maintain his daughters, it is unlikely that the father would have wished to make any provision for his daughters in his Will, even if forfeitable.

The judgments in *Wellesley v The 8th Earl of Cowley* and *Miles v Shearer* do, however, emphasise the right of a testator to testamentary freedom, and do not give great encouragement to adult children (absent special circumstances) to make a claim under the 1975 Act. On that basis, the provision of a modest legacy, liable to be forfeited on the making of a claim, should at least be considered by a testator, if pitched at the right level.

Limited value of no-contest clauses

The difficulty is to settle on a figure or benefit which is large enough that its loss would provide a sufficient disincentive to a potential claimant, but which at the same time is not too large or generous that it represents more than the testator is willing to give.

In most cases, therefore, it may simply be better to dispense with a no-contest clause and either to:

(a) leave nothing to the estranged child; or
(b) leave only a small legacy

in both cases, perhaps, with a letter setting out the testator's reasons.

Where a no-contest clause might be considered

There may, however, be cases where the inclusion of a no-contest clause might be considered by a testator. The testator may be prepared to make reasonably generous provision for a potential applicant, but be concerned to deter a future claim under the 1975 Act.

The testator may, for instance, be prepared to make reasonably generous provision for a cohabitee/dependent by means of a legacy, or a life interest in the property shared with the testator. However, the testator's first priority may be to provide for their children, and the estate may not be sufficiently large to make overly-generous

provision for the cohabitee/dependent.

The testator might in these circumstances consider the provision of a life interest, or a not-ungenerous legacy, coupled with a forfeiture clause in the event of a claim being made. This might well induce the claimant to accept the provision on offer.

The prospect of losing a reasonable legacy or other benefit would be of particular concern to a potential claimant, especially if the claimant has any difficulty in establishing eligibility to bring a claim. A person bringing a claim as a cohabitee may not be eligible if, for instance, they retained a separate household for any part of the 2-year period before the testator's death (see *Churchill v Roach* [2004] 3 FCR 744; *Baynes v Hedger* [2008] EWHC 1587 (Ch)) or if the relationship fell short of that between a "man and wife" (see *Amicus Horizon Ltd v Mabbott's Estate* [2012] EWCA Civ 895). A dependency claim may fail if the applicant and the deceased made broadly equal contributions towards the reasonable needs of each other, or if any settled dependency had come to an end before death.

One option is that the testator could provide that a cohabitee should be entitled to (a) a legacy and (b) a right to continue living at the deceased's property for a fixed period, say 6 months from death, with a provision that the legacy should be reduced by a specified amount for every month that the applicant remains in occupation of the property after the expiry of the 6-month period.

Letters of testator's reasons

A letter of the testator's reasons for making no provision, or only limited, provision for a potential claimant, such as an estranged child, should be considered.

Such a letter does not guarantee that the court will uphold the testator's wishes, since the court must make an objective determination of the issue of whether or not it was unreasonable to make no, or only, limited provision. The subjective reasons of the testator will, therefore, be disregarded if they are conflict with the objective matters that must be taken into account. Indeed, if the testator comes across in the letter as being capricious, unfair, prejudiced or mistaken as to a material fact, the letter may backfire.

Nonetheless, the testator's wishes are part of the circumstances of the case and fall to be assessed along with other relevant factors (*Ilott v Mitson* [2018] AC 545, para. 47). Particularly in estrangement cases between a parent and child, a letter or memorandum by the testator referring to the child's conduct as the cause of the estrangement and the absence of any relationship may assist the court to conclude that the child no longer has any reasonable claim on the parent's bounty and/or no reasonable expectation of benefit (see *Garland v Morris* [2007] EWHC 2 (Ch); *Wright v Waters* [2014] EWHC 3614 (Ch)).

It may also be advisable for a testator to explain their decision to benefit a beneficiary, such as the care and attention shown by that beneficiary and/or that beneficiary's financial needs.

The letter should, of course, be accurate, and may need to be reviewed from time to time. The weight to be given to it would be significantly undermined if it is based upon a false premise, e.g. that a beneficiary, or potential applicant, is financially comfortable, when that is not the case (see *Thompson v Raggett* [2018] EWHC 688 (Ch)).

Agreement with beneficiary

A testator might be advised to consider attempting to reach an agreement with a potential beneficiary that no claim will be brought under the 1975 Act if the beneficiary receives £x under the Will.

Such an agreement is no doubt unenforceable on public policy grounds (see *Hyman v Hyman* [1929] AC 601). However, it would be a relevant conduct for the court to take into account under s. 3(1)(g) of the 1975 Act when determining whether reasonable provision has been made. The court will, in ancillary relief claims, give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement (*Radmacher v Granatino* [2011] 1 AC 534). The same principle should apply in 1975 Act claims.

Position of Executors

Executors should remain neutral in 1975 Act claims. The dispute is between the applicant and the beneficiaries. If a claim is commenced, triggering a no-contest clause, the court will determine, or the parties will agree, what provision, if any, is to be made under the 1975 Act. The legacy or other benefit under the 1975 Act will be

forfeited, unless it is agreed that it is not.

Some or all of the Executors may also be beneficiaries. It is for them to determine, in their capacity as beneficiaries, whether to contend that the provision made by the Will is reasonable and/or that the forfeiture clause has been triggered. Of course, they take the risk of a costs' liability if the court holds that the provision made by the Will is unreasonable, or that the forfeiture clause has not been triggered.

However, it should be clear whether a no-contest clause has been forfeited. In most cases, the trigger event will be the issue of proceedings, even if the clause refers to a beneficiary taking any steps whatever (whether directly or indirectly) to contest the Will. If the trigger event is defined to include some specific step such as the sending of a letter of claim, it should be clear whether such a letter has been sent.

A potential applicant might, however, engage solicitors to write a letter which intimates a possible claim, but then abandon any such claim. The no-contest clause may provide that it is triggered by a letter of claim. There might then be a question as to whether the letter intimating a possible claim counts as "a letter of claim". The personal representatives could apply to the court for directions under CPR Part 64, particularly if the persons who would benefit from a forfeiture contend that there is a forfeiture, and the beneficiary disputes this. Provided that the application is reasonably made, the personal representatives should be entitled to their costs out of the estate on an indemnity basis. However, such cases are likely to be rare.

Radcliffe Chambers