

CLARITY

a movement for the simplification of legal English

NEWSLETTER

NO. 5

OCTOBER, 1985

Contributions to:— John Walton, 5 The Croft, High Street, Hillmorton, RUGBY, Warwickshire CV21 4EQ

Wills Issue

In the last issue, we invited contributions to a special feature on Wills. Although hardly overwhelmed by the response, we did receive sufficient to be able to give special emphasis to the topic in this issue — resulting in a 50% increase in size. While one or two of the contributors have been mentioned by name, others may find their ideas reflected in other articles. Thanks to all of you for what I hope proves to be a useful edition.

Next Feature

This is to be on the pre-contract aspects of residential conveyancing (advice to clients, preliminary enquiries, special contract conditions, etc.) A few contributions have already been received but much more in the way of precedents and advice is needed if we are to offer an interesting feature. How about some of the favourite "awful" preliminary enquiries you have received (though of course never sent)?

Annual Meeting

As already notified, this is to be in Rugby on 5th October. The meeting will follow last year's successful formula of formal business, a brief address by a guest speaker and an open discussion on CLARITY (continued, if desired, over a pie and a pint in the Saracen's Head). This year's guest speaker is Mr Richard Castle, who has kindly agreed to enlarge on his recent article in the Law Society's Gazette, "Leases: Time for Change". A report on the meeting will be included with the next newsletter.

Members

Current membership is now over 300. A supplementary membership list is included with members' copies of this newsletter. Please remember to let Mark Adler know of any name/address changes.

Finances

Members will also receive with this newsletter a copy of the audited accounts of CLARITY for 1984/85. It is encouraging to see a reasonably healthy financial position, particularly bearing in mind CLARITY's aspirations in legal education.

LEGAL EDUCATION

CLARITY is planning to hold a half-day Seminar on the drafting of Legal Documents in "CLARITY approved" English in Autumn 1986. This will be held at Trent Polytechnic, Nottingham with whom we have already had some preliminary discussions. We hope it can take place on the same day as one of Trent's Law Society continuing education half-day courses (which is why we are not holding it earlier in 1986) which we think will encourage those just starting their professional careers to attend and to begin thinking or be helped to continue thinking about drafting clear documents. If we are really fortunate, we may be able to have the course approved by the Law Society to earn continuing education points. The Seminar will not of course be limited to those attending a continuing education course and indeed we hope the choice of Nottingham as a venue will make it accessible to a considerable number of people, both members and non-members of CLARITY. The publicity for CLARITY we hope will be another way of advancing our ideals.

The format planned as present would consist of a lecture type session, a session in small working groups (CLARITY-led, we hope) tackling a specific piece of drafting, a session discussing the drafting exercises and to close a general discussion and/or question and answer session. We hope to have professional lecturers in agreement with CLARITY's aims to provide a forum.

These are of course ideas only at present and views and comments would be welcome.

We do not have a firm idea on costs either yet but are trying to make the Seminar fairly budget price, possibly about £25.00.

Katharine Mellor

WILL DRAFTING

by Mark Adler

All wills (except the unusually vague) cope only with a limited range of circumstances. The draftsman hopes to cover the reasonable possibilities but not to provide for every conceivable contingency. A common form provides for surviving spouse and children. There may be a gift over in case of disaster but if all combinations of mortality are explored the will becomes eccentric. The same moderation should apply to the style.

I remember, but cannot trace, a report that a note "All for mum" was upheld as a will. If so, why ask a lawyer to say "I hereby give, devise and bequeath the whole of my real and personal estate whatsoever and wheresoever to my mother . . ." when nobody knows what he's talking about anyway?

Much wording is ritual, its source forgotten. It may have had a purpose no longer applicable. It may just have been that the original draftsman was a windbag. To include a word or passage because we do not know the effect of removing it is an admission of failure: we are paid to know.

If standard texts are not regularly cleared of barnacles they become forever longer and less appropriate, the material parts harder to find. The modern commercial lease is a good example. Word-processors should be used to edit text as well as to reproduce and merge it.

I have set up below a few standard will clauses, italicising the expressions which I think can be omitted without any change of sense and adding notes. I also offer some extracts suggested by CLARITY members. I have not attempted to deal with the trusts which may be needed in any but the simplest circumstances and no attempt has been made to provide a comprehensive draft.

Please send the hate mail to John Walton.

(Editor: but only in his capacity as Editor, I trust. Constructive criticism would of course be of greater value.)

I, (name) of (address), (*occupation*)¹ *hereby*² revoke all wills and testamentary dispositions³ heretofore made by me⁴ and declare this to be my *last*⁵ will.⁷

1. His occupation is not needed to identify the testator.
2. "Hereby" adds nothing: how else should he be doing it?
3. S.1 of the Wills Act 1837 provides that "Will shall extend to a testament, and to a codicil" So what could be a testamentary disposition that isn't a will (and, if anything, has the testator made one)?
4. The testator would not be revoking other people's wills. "Former wills" is better than ".... heretofore made" and may be necessary to avoid self-revocation.
5. "Declare" may be unduly pompous but would the courts accept a document which looked like a will but did not make clear that its provisions only took effect on the maker's death?
6. Because of the revocation it is the only will. In any event, the date of execution is conclusive. Whether it is the last ever is immaterial. Strictly speaking, all unrevoked testamentary dispositions together form a single will.
7. The whole clause is clumsy. Better is "I make this will and revoke all former wills." "I make this to replace all former wills" includes the revocation of the old and the creation of the new. A well-drawn will normally deals with the entire estate and therefore revokes automatically any former gift; however, executorship and ancillary clauses may stand unless specifically cancelled.

If and only if my *said* wife survives me by one *calendar*¹ month then I give her all my estate *absolutely*.²

1. S.61 LPA 1925 defines "month" as a calendar month "in all wills".
2. A gift is a gift of the donor's whole interest unless a contrary intention appears.

"If the gift to A lapses" covers the failure of a gift other than on the death of the beneficiary and is important now that divorce annuls a gift to the former spouse; in a recent case, a gift "if my wife does not survive me" was lost in these circumstances, creating (I believe) a partial intestacy.

I give all my property after payment of my debts and funeral and testamentary expenses¹ and for the erection of a tombstone to my executors² upon trust for sale for the benefit of jointly.

1. These are in any case a first charge on the estate.
2. In their role as trustees, as in the definition clause (see below).

My executors may in their absolute discretion:

- (A) Postpone the sale of any property;
- (B) Invest the proceeds as they think fit;
- (C) Insure in any amount;
- (D) Obtain expert advice.¹

No executor shall be liable for any loss not attributable to his own intending breach of duty nor shall one executor be bound to take any proceedings against another.

1. But can these four powers be replaced by: "My executors shall have all the powers of absolute owners (save for their own benefit)"?

I declare that any personal representative or trustee for the time being hereof being a solicitor or other person engaged in any profession or business may be so employed or act and shall be entitled to charge and be paid all normal professional or other charges for any business or act done by him or his firm in connection with the administration or the trusts hereof, including acts which could have been done personally.

1. This can all be replaced by "Any professional executor or trustee may be paid his or his firm's normal charges".

And finally, particular care is required with a gift of the contents of the testator's house. "Contents" may pass money and cheque books, which would presumably not be intended. "Chattels" might pass leasehold property. "Personal chattels" as defined in AEA s.55 includes jewellery, cars and horses. "Effects" includes all personalty and is therefore too wide. "Household effects" excludes jewellery but (on the particular facts of a 1908 case) included a car. "Personal effects" probably means the same as "personal chattels".

Richard Castle suggests a definition clause near the beginning of the will. For example:

In this will:

- (a) "John" is John Jones of
- (b) "My executors" are:
 - (i) John; and
 - (ii) David Jones of the same address, if John does not act or if there are minor beneficiaries;and "executor" includes "trustee"; and
- (c) A gift shall lapse unless the donee survives me by one month.

P.E.S. Fawcett suggests the use in will-drafting of tabular schedules giving the names and addresses of and gifts to legatees.

There appears to be no statutory requirement or other justification for the "In witness" clause in a will, so why bother with it?

INLAND REVENUE FORMS RESEARCH

The Inland Revenue is sponsoring a Research Fellowship into the problems of administrative forms. The work is being undertaken by an officer of the Department, Mr J M Foers.

Mike Foers is an Inspector of Taxes who for the past seven years has been involved in implementing the Government's initiative on simplifying forms within the Inland Revenue. He has worked with the Department of Typography and Graphic Communication at Reading University and will be associating with them in this research.

The work will involve a comparative study of the ways in which Governments, particularly Revenue Departments within Governments, tackle the problems of communication through the forms they use. It is proposed, initially, to look at three main areas:

- the simplification of language - with particular reference to legal language
- the problems of the competing demands of computer-produced forms (with special emphasis on laser printers) and human factors
- the use of colour tinting, response areas and graphics in forms design.

The work starts in September 1985 and the Fellowship will last for 12 months. Mike Foers will be visiting many countries during that time but clearly will only be able to talk to a limited number of people. However he would be pleased to hear from anyone who has views on any of these areas of study, or any related areas, and will welcome examples of good and bad forms which illustrate the problems. Mike can be contacted either through the Forms Information Centre at Reading University or for the next few weeks at Room 705, Princeton House, 271 High Holborn, London WC1V 7ED (telephone 01-831 7222 Ext 319). His home address is 19 Lancaster Road, St Albans, Hertfordshire AO1 4EP (telephone 0727-32530).



WHERE THERE'S A WILL

A simple and effective blow for the cause of better legal English could be struck if every member of CLARITY resolved to use either of the very short attestation clauses given in the "Encyclopedia of Forms & Precedents". One was judicially approved in *Re Selby-Bigge* (1950) and the other was approved by the Principal Probate Registrar — so why any solicitor should continue to use twice as many words as necessary is beyond me.

The form I have used for about fifteen years is:

"SIGNED by _____ in our joint presence and attested by us in the presence of him (her) and of each other"

It could be even shorter: however, we need not be brief to the point of baldness, and it clearly impresses on the testator and witnesses that if they all see each other sign they cannot go wrong.

David Lyall, Cheltenham.

Editor's Note:

The long form of attestation clause commonly used in wills is:

Signed by the above-named as his last will in the presence of us present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

The simpler form given judicial approval in *Re Selby-Bigge* was:

Signed by the above-named in our presence and attested by us in the presence of him and of each other.

The even simpler form approved and even welcomed by the Principal Registry of the Family Division is:

Signed by the above-named in our presence and then by us in his.

(re-printed from Newsletter No. 2)

CLARITY'S OBJECTIVES

I agree with the three "broad objectives" agreed at the annual meeting, but I wonder whether there is insufficient distinction drawn between the drafting of legal documents as such and the writing of letters. Most of our clients do not read the documents we send them, as they rely on us to get them right and it is our fault if they are ambiguous. Our clients do, however, read and try to understand our letters, including copies of the letters we send to one another. "Legalese" is at least appropriate for legal documents; it is appalling when used in correspondence. I would like to see at least a section of CLARITY newsletter specifically concerned with "plain English" for letters, which are, and must remain, our main means of communication.

Objective No. 2 refers to legal education. Page 1 of the newsletter refers to the Law Society's continuing education programme, but in my opinion education should start much sooner than that. I am appalled to find how badly trainees and newly qualified solicitors write. So many of them seem to think that a lawyer's letter has to be written, even to a client, in legalese. I hope therefore that the Committee will concentrate on the earlier stages of education because it is clearly then that bad habits are adopted.

Hugh Riddick,
Eastbourne

- (Editor's notes: (i) contributions on letter-writing would be welcomed;
- (ii) as reported in this issue, the Committee is indeed looking at training for trainee and newly-qualified lawyers.)

THE USE OF PRECEDENTS

In CLARITY's fourth newsletter my partner, Martin Fairbairn, takes me to task for my tongue-in-cheek assertion that people who share my view (that clarity of expression comes from understanding the subject matter, logical thought and a proper use of English) only need precedents to assist them to develop their drafting style.

I am afraid that I was wrong to qualify the word "only" with the words "for instance". However I agree with Mr Fairbairn that precedents do have other uses and I have to admit that, in practice, I use them (after critical consideration) as labour-saving devices in the manner he suggests.

M.P.H. Tyler,
Kowloon

HELP RECEIVED

The lack of response to last issue's invitation to use a HELP PLEASE column is clearly good news, for it can only mean that you are all self-sufficient enough not to need the help of other members. If, however, there should be an end to this idyllic state of affairs, do bear the service in mind.

And it works! In the last issue, Parry Thornton of the Leeds Council for Voluntary Service asked for help in drafting understandable governing instruments for voluntary organisations. Parry describes the response he received as *embarrassingly good*. He has had offers of various kinds and is now considering how best to harness this help. He adds *your HELP PLEASE column does work, and you do have members who will respond*.

THIS SPACE COULD
HAVE BEEN USED BY
YOU

PARKER RE-BORN?

Mr J.M. McKean reports that he and colleagues are making a very real attempt to get new editions of *Modern Conveyancing Precedents* and *Modern Wills Precedents* published within the next year or so. They believe that this time they will make a much better job of it because, of course, they have had very considerable experience of the operation of their precedents in practice.

We look forward to being able to review the new Parkers in CLARITY newsletter.

PLAIN AUSTRALIAN

"Kennanisation" is the name given by Victoria's Attorney General, the Hon. J.H. Kennan, to the process by which all future parliamentary bills in the State are to be expressed in plain English. The instructions to Parliamentary Counsel include these examples:

The very first section of any Bill will be a statement of the purposes/objects of the Bill;

There will be an attempt to avoid the use of Roman numerals and an endeavour to ensure that Bills are numbered decimally; and

The term "must" will replace the term "shall" wherever "shall" is used to impose an obligation. The term "where" or "in circumstances where" should not be used as a synonym for "if".

Earlier this year Mr Kennan told the Victorian Legislative Assembly, "What needs to happen now is to have a process whereby Parliamentary Counsel draft bills from the outset in plain English. This requires a radical departure from tradition and a break with the thinking of the past. It requires imagination, a spirit of adventure and a boldness not associated normally with the practice of law or with the drafting of legislation"

Or, indeed, with lawyers' documents and letters, Mr Kennan!



AND SOME LESS SIMPLE WILLS

In 1557, one testator prefaced his will:

"George Warde, mariner and bachelor, born in the town of Newton in the County of Richmond, now being shipped in the good ship called The Teager and in the said ship I am appointed to go into the land of Guinea, being a long and dangerous journey, having no certainty of my life nor sure coming home, and do consider my bounden duty towards my poor mother Sibell Warde and my four brothers all dwelling the which of right and good conscience ought to have all that I have or shall have if God take me out of this world in the time of this my journey, do make this my will"

and an 1804 will read:

"Maybe I am not worth a groat,
But should I die worth something more,
I leave it all, with my old coat,
And all my manuscripts in store,
To those who will the goodness have
To cause my poor remains to rest
Within a fitting shell and grave:
This is the will of Joshua West."

(from a larger paper by Ian Johnstone)

A LOGO FOR CLARITY?

Thanks to the one or two members who submitted logos or slogans. Although we didn't feel that any were quite snappy enough, your efforts were appreciated. So, the offer is still open of a year's free subscription (and, doubtless, immortality too) for any logo/slogan subsequently adopted by CLARITY.