Resolute Wills

Disclosing information post death

Where we act for a testator preparing a will, the firm owes a duty of confidentiality to the client in relation to the matters covered by the retainer. In addition, legal advice privilege ('privilege') will attach to all or most of the communications between the firm and the testator/client in the course of the retainer.

That right to confidentiality and to privilege passes, on death, to the client's personal representatives.

Where the personal representative is an executor (i.e. a person appointed by a will) then they have authority as such from the date of death. If they are an administrator (i.e. appointed on an intestacy or otherwise by the court) then their authority dates from the date of the grant of letters of administration.

Disclosure of the contents of a will, and of the instructions regarding that will, on the death of a client without consent from the personal representative (or representatives, if more than one) may be a breach of confidentiality and of Privilege. Accordingly, and in most cases, in relation to most information, you can only disclose such matters with authority.

Accordingly, you cannot properly disclose such matters, in the absence of authority to do so.

Authority may come from:

1. The testator client (while still alive) – this may be contained expressly in the retainer or in a written statement made to the firm during the retainer (e.g. authorising disclosure to specified persons after death)

2. Their personal representative

3. The persons who are together all entitled to the estate (whichever will is valid), i.e the beneficiaries

4. An order of the court

5. Some statutory or other authority

On a request for disclosure, including one termed as a *Larke v Nugus* request, you must ask yourself whether you have the authority to disclose information that is otherwise confidential and privileged.

If you are the only named executor, you may be able to decide to waive both confidentiality and Privilege. If you are one of the named executors, you may jointly decide to waive both confidentiality and Privilege. If you are not a named executor, those persons who are the named executors may decide to do so.

Where the validity of a will is disputed there may be a dispute as to who the personal representatives are. For example, one person ('A') may be appointed executor of a later will but another ('B') is appointed executor of an earlier will. If the validity of the later will is challenged it will not be clear if A or B is the personal representative.

In those circumstances, you may be better to have the consent of all the rival claimants (in the example, A and B). However, it is considered that rival claimants to a grant of representation cannot assert a right to confidentiality or Privilege against each other. In those circumstances it may be possible to make disclosure to those rival claimants (i.e. to both A and to B).

A further alternative would be to obtain the consent of all the persons who might be entitled to the estate, whatever the outcome of the dispute, i.e. the beneficiaries.

If the testator's Privilege was shared with some other person or persons during the testator's lifetime, you are bound not to make any disclosure, even to the testator's successors in title, unless you have the consent of the other person or persons entitled to the privilege. (See Halsbury's Laws of England, 5th edn, vol 102 para 885).

Larke v Nugus requests for information

Where you have been asked to disclose otherwise privileged and confidential information, you should consider carefully the Court of Appeal decision in *Larke v Nugus*

In *Larke v Nugus*, the court took into account the Law Society guidance on disputed wills, which said:

> "If the testator is dead, the solicitor must not disclose any information before probate is granted, except to the executors, without the consent of the executors. But this will not necessarily apply where a solicitor is asked to disclose information about a will which they have prepared and which is in dispute.
>
> Privilege cannot be claimed by one person claiming under a deceased testator's will as against another person having a similar claim in respect of matters communicated by the deceased to the solicitor during the lifetime of the deceased. The testator's solicitor could be compelled by the court under subpoena to answer questions directed to eliciting communications made to them by the testator in the course of preparing the will if put to them by either party.
>
> Where a serious dispute arises as to the validity of a will, beyond the mere entering of a caveat and the solicitor's knowledge makes them a material witness, then the solicitor should make available a statement of their evidence regarding the execution of the will and the circumstances surrounding it to anyone concerned in the proving or challenging of that will, whether or not the solicitor acted for those who were propounding the will."

The court declined to make an award of costs against parties in a probate action who had unsuccessfully challenged the will because a solicitor executor had failed to follow that advice.
In the leading judgment it was said that: "when there is litigation

about a will, every effort should be made by the executors to avoid costly litigation if that can be avoided and, when there are circumstances of suspicion attending the execution and making of a will, one of the measures which can be taken is to give full and frank information to those who might have an interest in attacking the will as to how the will came to be made."

The Court of Appeal made it clear that the information required related to both:

- the circumstances in which the testator gave instructions for the will, and
- the circumstances in which the will was executed

Senior Courts Act 1981 and Civil Procedure Rule

If a probate claim is issued, the court will require disclosure under CPR 57.5 (which requires parties to the litigation to lodge with the court all testamentary documents within their possession or control together with a witness statement about testamentary documents). This provides an exception for the disclosure of information that would otherwise be privileged and confidential.

Similarly, section 123 of the Senior Courts Act 1981 enables a probate registrar to issue a witness summons (technically still called a subpoena) under the Non Contentious Probate Rules requiring that person to lodge a will or codicil at the Probate Registry.

Pre-issue, there is possible assistance under CPR rules 31.16 whereby the court has powers to order pre-action disclosure of relevant documents from a potential party. However, this rule does not authorise the court to override a valid claim to legal professional privilege.

If the will preparer is not also a named executor, then it is unlikely that the will preparer would be a potential party to proceedings - and, as such, CPR 31.16 may have no relevance.
If there is any doubt, or the above authorities are not applicable, you will need the consent of all rival claimants to a grant to authorise disclosure of confidential privileged information.

UK GDPR

In the UK General Data Protection Regulations (UK GDPR) 'personal data' means any information relating to a living, identified or identifiable natural person.

'Special category data" includes any personal data revealing:

- racial or ethnic origin
- political opinions
- religious or philosophical beliefs
- trade union membership, and
- data concerning health or a natural person's sex life or sexual orientation

Any will file will be likely to contain personal data, and some of this data may be special category data.

Sharing personal data amounts to 'processing'. Personal data can only be processed if there is a specific lawful basis to do so.

Lawful bases include legitimate interest, consent or legal obligation (compare article 6 UK GDPR).

The safest course, in the absence of a court order, may be to have the explicit consent of the person whose data it is (although it should be noted that consent can always be withdrawn).

Where the data is special category data, as well as identifying one of the legal purposes set out in Article 6, the data controller must also identify an applicable condition under article 9 and document this.

If, therefore, you are requested to make disclosure of a will file that includes personal data of another (living) person and you do not have the consent of that person, you should consider whether another article 6 purpose applies.
Alternatively, it may be possible to make disclosure of copies but with all personal data removed or "redacted".

You may also be faced with a Data Subject Access Request

('DSAR') by a disappointed beneficiary who wishes to see the contents of your file. A DSAR and other rights of a subject only relate to the personal data concerning that individual. The UK GDPR does not confer more general rights to information.

In such circumstances, remember that the request is confined to that person's data and that a number of exemptions apply to compliance with DSARs including legal professional privilege.

We recommend you consider the redaction of data, or extracting only the personal data held by you, so as to avoid disclosing information that is wider than necessary, particularly where there are concerns about confidentiality and about revealing the personal information of others.

The ICO website provides further detailed guidance on how to respond to DSARs including guidance on the time limit for responding to DSARs.

It is also important to consider whether data laws of other jurisdictions may also apply.

Responding to a request

You may be requested, in what is known as a '*Larke v Nugus* letter', to provide a full statement of evidence as to the preparation of the will, and the circumstances in which it was executed, to anyone who has an interest in the dispute, whether or not you are acting for any of the parties.

You are under no duty to comply with the request. However, you do have a duty to make every effort to avoid potentially costly litigation (as advised in *Larke v Nugus*).

If you do choose to respond to the request, then:

- if you are named as an executor in that will (as in *Larke v Nugus*), you should provide the requested statement and relevant documents, so long as no other person has a sustainable claim to legal privilege in the material

- if you are not named as executor in that will, you might indicate you are prepared to make a statement and provide relevant documents, but that you first require confirmation that neither the named executor(s) (or, if there is none, the other persons interested under the will) nor any other person, make a claim to privilege in the material, and that they consent to your disclosure. Subject to obtaining such consent, you should provide the statement and documents
- you should consider the redaction of personal data from any materials provided in order not to breach the principles of UK GDPR (see above)

In responding to the request, you should make available any documents in your possession that are relevant to the proceedings to avoid the cost of unnecessary applications to court. Providing this information promptly when a will is initially challenged may dispel suspicions and save costs in the long run.

The quickest and easiest way of complying with such requests will often be to copy the material parts of the will file (material to the dispute) but without providing personal data.

This may not always be practical but if no personal data is disclosed then UK GDPR will not apply to the sharing of the materials.

You should make a full attendance note at the time the will is prepared. You should also preserve the file (see our practice note on retention of files).

Reasonable charges

There is no prohibition on charging.

If you do seek to charge, then those charges should be reasonable, in accordance with your duty to treat others fairly.
It is for you to decide in the circumstances whether it is appropriate for you to do so. A reasonable charge may also be made for photocopying.

You may wish to retain a record of correspondence relating to your charges for preparing a *Larke v Nugus* statement, as well as any agreement regarding how the charge will be paid.

Professional liability

Where there is an explicit or implicit threat of a claim for negligence or other breach of duty related to the preparation of the will, then your obligations to respond to the request(s) are the same.

However, in addition you should:

1. insofar as they might be affected by the breach of duty, inform any lay executors and beneficiaries of the will that they should take independent advice, and

2. immediately inform your practice's insurers of the existence of a potential claim

Consequences of failure to provide full information

In *Larke v Nugus*, the court made no order as to costs and the Court of Appeal refused to order those challenging the will to pay the costs of the challenge, even though the will was found to be valid. This was because the solicitor who had prepared the will refused to make information available at an early stage which, had it been given, could have prevented a full trial.

In this sort of case the value of an estate may be substantially reduced by the costs of the probate action, and there is a serious risk that the beneficiaries of an estate that has been reduced in this way will bring an action to recover costs of litigation against the firm who failed to disclose the relevant information at an early stage.

As the purpose of a *Larke v Nugus* statement is to prevent money being spent on futile litigation by the provision of early pre-action disclosure, the onus is on you to provide a prompt reply and

relevant evidence to facilitate early settlement, subject to any sustainable claims for privilege and subject to UK GDPR.

Providing a response shortly before trial, when most of the costs have been incurred, is unlikely to protect you from an adverse costs order. You should therefore provide a full response to a request within a reasonable period, for example: two to three weeks, or as long as is necessary to:

- retrieve the file
- consider the contents
- obtain any necessary consents to disclosure
- copy any necessary parts of the file
- provide the statement to the relevant parties

It is beyond the scope of this policy, but a failure to respond to a data subject request can in the worst cases result in a very significant financial penalty.