

Answer to the reader's question on executor duties by **Melissa Ellis, Solicitor at Payne Hicks Beach** first published online in the Financial Times on 22 August 2017

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We want to sell our aunt's painting — but her will forbids it

Can we go against her wishes and go ahead with the sale?

“Your Questions”



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Art sale puts deed of variation in the frame

I am the executor of my great aunt's will and she stipulated her art collection stays in the family and is not sold. There is an extremely valuable piece the family would like to sell; they are all in agreement about this. Am I and my fellow executors allowed to let the sale go ahead?

In theory the role of an executor sounds a simple one. Executors are required to gather in the deceased's estate and distribute it in accordance with the terms of the deceased's will, subject, of course, to paying any inheritance tax and other liabilities.

However, we all know life is never that simple. Andrew O'Keeffe, partner and head of the private client team at Wedlake Bell, says it is questionable whether a direction in the will not to sell the art collection is legally binding. It may well be the executors could proceed with a sale of the art collection, notwithstanding the direction in the will, without breaching their duties.

This would certainly be the case if the only asset of the estate is the art collection and there is a significant amount of inheritance tax to pay, then the executors would be forced to sell the collection, or part of it, to pay that tax.

The best answer to the conundrum posed is relatively simple provided all the beneficiaries named in the will are over 18 and have the necessary capacity to agree to the proposed action. If that is the case they could enter into a deed that varies the provision contained in your great aunt's will to remove the wording that the art collection (or a specific item) should not be sold. It will be necessary for executors and all beneficiaries to be parties to the deed and their respective signatures would have to be witnessed by independent witnesses.

A "deed of variation" is not treated as rewriting a will but it does allow for retrospective inheritance tax and capital gains tax treatment where a will is being substantively varied provided it is executed within two years of the testator's death.

Executing a deed of variation would provide all concerned with the certainty that might be needed as there would be a record of what was agreed should memories fade as time passes.

Melissa Ellis, solicitor at Payne Hicks Beach, agrees. Some people choose to impose conditions on the gifts they make and your case is an example of what estate practitioners call an attempt by someone to "rule from beyond the grave". However, it does not mean these conditions are enforceable.

The most common reason for conditions to be unenforceable is they are deemed to be illegal or against public policy. While what has been considered against public policy has changed over the years, conditions imposed on the gift that incite the recipient to commit a crime, change their religion (while still a child) or which unreasonably restrain them from marrying or entering a particular profession remain valid examples.

However, your case falls into a separate category as a condition that goes against an ancient doctrine called "restraint on alienation". This is where you give someone absolute ownership of an asset and then attempt to prevent them from exercising their rights as new owner. This is contrary to the principles of law affecting the gift as it limits the new owner's power ("the power of alienation") to deal with the gift as they wish.

In this case, your great aunt is purporting to make a gift of the art collection and then attempting to restrict it to being kept in the family and not sold, thereby preventing the recipients from dealing with it as they wish. These conditions are therefore likely to be void and unenforceable, meaning the artwork can be sold provided all the recipients who inherited it agree to this. While it is helpful the whole family is in agreement, unless they are all recipients their agreement is not necessary.

As an aside, your great aunt could have made it more difficult for the family to sell the artwork had she left it in trust under the control of a professional trustee rather than leaving it outright to the recipients. This would have enabled the collection to be retained for future generations and would have been more effective in preventing family members from breaking up the collection.

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Our next question My father-in law, 88, is in very poor health, but has refused to make a will as he does not trust lawyers. The major part of his estate will be his London home, which he shares with his second wife, but is solely in his name. What are the likely consequences of his intestacy and the ownership status of the property?