

The Personal Tax Planning Review

BOOK REVIEW

Drafting Trusts and Will Trusts - A Modern Approach,
2nd Edition 1995 by James Kessler, published by Sweet
& Maxwell Ltd. ISBN 0 421 54240 3
Hardback 373 pages Price £70

When one considers how much of a lawyer's time and skill is devoted to the use of words and to the production of documents intended to record the intentions of the persons making them, it is quite astonishing how few are the resources devoted to the task of drafting. Books there are aplenty, but they are mostly devoted to the *substance* of the law - law reports and text books. Occasionally something more practical is published, as on advocacy, or on negotiation or mediation, for example. But little is available on the science of drafting.

This book - this very good book - is a rare exception to that general position. The author is a practising tax barrister of considerable experience. And much of that experience has been distilled into the book. Although it is not about drafting *in the abstract* but about the drafting of inter vivos and will trusts, nonetheless its sixteen chapters and various precedents express a coherent set of drafting principles, as applied to a particular area of practice.

The book is in two Parts. Part One begins with some general comments about drafting and about style, before moving on to consider the beneficiaries, the trustees and their powers, and certain technical matters, in particular the impact of the rule against perpetuities. It goes on to deal in some detail with the usual provisions one might expect to find in any trust instrument, and then in a series of chapters considers various kinds of settlement: interest in possession, accumulation and maintenance, discretionary, will trusts. Next there is a lengthy discussion of administrative provisions, and a short but pithy survey of stamp duty, which in its application to trusts is, as the author reminds us, both "frivolous and vexatious". Lastly in this part of the book is a chapter dealing with the due execution of wills and trust instruments. Part Two of the book contains a series of precedents, both for lifetime settlements and for will trusts, together with a series of precedents of administrative provisions. These precedents are also contained on a computer disk

in a pocket on the inside back cover. The data files are in the format of *Word Perfect 5.1 for Dos* and *Microsoft Word 6 for Windows*.

For me the substantial value of this book is twofold: first, the collection together of the many quirky points of law relating to drafting and construction of settlements (*most* of which, I am pleased to say, I had already come across), and second, the stimulating discussion of the merits of this or that approach as against another. Really, reading this book was sometimes like having a tutorial with a high-powered Oxbridge don. And some sections of the book stand out as examples of exposition and explanation of obscure points which one simply cannot find elsewhere. One of these is the discussion (at pp 180-184) of the statutory excessive accumulation permitted by s.165 of the Law of Property Act 1925.

Of course, there are a few misprints here and there (perhaps the most amusing of which is the reference to a "doctrinal thesis" on p 9, at note 1) and, as a lawyer who does not possess a set of Tax Cases, I found the constant reference to only that series of reports in the footnotes a little tiresome. More seriously, perhaps, there are a few - a very few - statements I felt some doubt about. One is the suggestion that trustees considering a distribution to beneficiaries "have all the protection they could reasonably expect", referring (as one would expect) to the Trustee Act 1925 s.27. But s.27 does not extend to *all* trusts. It only extends to "the trustees of a settlement or of a disposition on trust for sale or personal representatives". And "settlement" is defined (by s.68(1)(15)) to bear the same meaning as in the Settled Land Act 1925, i.e., a Settled Land Act settlement. Moreover, the reference to "a newspaper circulating in the district in which the land is situated" suggests that the section is confined to the case of a trust of land, whether held under the Settled Land Act or on trust for sale (and in the latter case the proceeds of sale may be distributed). The point is both obscure and arguable. But I do not think it is right blandly to say that trustees "have all the protection they could reasonably expect".

These few tiny gripes apart, James Kessler is to be congratulated on this second edition. This is a useful, indeed a necessary, companion for the trusts draftsman, even if (as with all good tutors) you do not always agree with what it says. It can be confidently recommended.

Paul Matthews