FIGHTING INHERITANCE ACT CLAIMS - A GUIDE FOR CHARITIES

In times of financial and fiscal austerity Charities face lean times. All of those who work and/or live in London will see individuals seeking to sign up members of the public to standing orders for regular gifts to various charities every day. You will also see members of the public going out of their way not to be caught! Shaking the collecting bucket does not produce enough to enable charities to continue their work and so legacies are a very important and welcome part of a charity's income.

What is not welcome are challenges to those legacies by aggrieved and disgruntled, normally, family members whose attitude is that they should take their relative's estate in full.

Whether a challenge is made, whether it proceeds even if made and what a charity should or will do about it is as much a matter of common sense and pragmatism as it is of law.

If an estate is large and the bulk passes to the family then there will probably be no challenge to relatively modest gifts to charity, particularly if the testator was known to be a supporter of the charity in question. This does not mean that the family will not be aggrieved but that there will probably be no legal basis on which to bring a

claim and, even if there were, the costs of the claim would be disproportionate to the amount in issue.

Where charities face serious problems is in cases such as **RSPCA v Gill** [2010] EWCA Civ 1430 where all or the bulk of the estate is left to charity. The decision in that case was a financial and public relations disaster for the RSPCA and has led to a marked increase in challenges to Wills generally and particularly ones involving charities.

Of course the challenge in **Gill** was not under the Inheritance (Provision for Family and Dependents) Act 1975 Act but was based on proprietary estoppel, undue influence and want of knowledge and approval but in appropriate circumstances a claim under the 1975 Act makes attacking the Will an easier target. The questions under the 1975 Act, having established that the applicant falls within the permitted classes of applicant, involve determining whether the Will (and it always will be a Will when Charities are involved) fails to make reasonable provision for the applicant and, if that question is answered in the affirmative what provision should be made. The question of provision is in the discretion of the Court and so makes the outcome far less predictable.

In recent years the real growth area in claims under the 1975 Act has been by adult children. Most frequently this occurs where the deceased has died leaving a spouse

of a second marriage with adult children of the first. The children of the first marriage do not want what they consider to be their family assets potentially passing to the children of the second spouse. This sort of reaction can also occur when the deceased leaves his assets to charity rather than to the adult children who think that they deserve them.

What is absolutely clear is that the principles set out in **Re Coventry** [1980] Ch 461 still apply. *"Subject to the court's powers under the Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession."*

The use of the words *"reasonable provision"* in the Act have led lawyers and some Judges into error on many occasions. There has been a temptation to look at the actions of the testator in relation to the disposition of his property and to decide whether he has behaved reasonably or not. This is to apply a subjective judgment to the behaviour of the testator and is completely wrong. The Act is not concerned, and so neither should be Courts be, with whether the testator has behaved reasonably or not but should properly consider objectively whether the effect of what the testator has provided by his will or on intestacy or combination of both is such as to fail to make reasonable provision for the applicant.

Thus, if a son had cared for his father all his life, running errands for him, seeing that he was fed etc. but the testator gave all his property to charity it could be said with some considerable justification that the testator had acted unreasonably but if the son was living in comfortable circumstances and was well able to and was in fact maintaining himself then the son would be very unlikely to succeed in establishing that the provision or absence of provision for him was objectively unreasonable. As a result a parent can behave totally spitefully and maliciously in leaving all his property to the Cats' Home but the child will and should still fail in his application is he is comfortably off an maintaining himself without difficulty. Equally a child can have behave abominably to a parent so that the deceased's behaviour in making no provision for him could be seen as totally reasonable behaviour but if that child is in great need the Court could conclude that, whilst taking into account the conduct, that the provision made was objectively unreasonable. If the child is living in straitened circumstances and the deceased father leaves everything to the Cats' Home then the Court is likely to decide that provision should be made for the son. This is not because the father acted spitefully and unreasonably, which he probably did, but because of the application of the correct test i.e. did the Will fail to make reasonable provision for the son's maintenance. If the correct test is applied then whether the beneficiary under the Will is a charity or an individual should make no difference.

In **Ilott v The Blue Cross and others** in the Supreme Court [2017] UKSC 17 the Judges made it absolutely plain that the Testator's wishes prevailed whether his wishes were rational or not or reasonable or not and whether he gave his estate to charity or others unless the effect of the provision was to fail to make reasonable provision for the maintenance, in the case of all classes of applicant save spouses or civil partners, of the applicant. As a result on applying the first test which the court has to apply in making decisions in an Inheritance Act claim the identity of the beneficiary is irrelevant.

We all know the facts of **Ilott** but briefly in that case the deceased left more or less all her property to charities with whom she had little if any contact during her lifetime. The applicant was her daughter from whom she had been estranged for over 20 years. The fault for the estrangement was shared but initially arose from the deceased, Mrs Jackson, disliking Mrs Ilott's partner, later husband. Mrs Jackson had shown a settled intention over many years not to leave anything to her daughter and Mrs Ilott knew this and for many years lived without expecting any provision. She lived with her husband and family in straitened circumstances but managed with the assistance of state benefits.

In **Re Coventry** Oliver J , as well as setting out the principles set out above went on to say *"It cannot be enough to say "here is a son of the deceased; he is in necessitous circumstances; there is property of the deceased which could be made available to assist him*

but which is not available if the deceased's dispositions stand; therefore those dispositions do not make reasonable provisions for the applicant." There must, as it seems to me, be established some sort of moral claim by the applicant to be maintained by the deceased or at the expenses of his estate beyond the mere fact of a blood relationship, some reason why it can be said that, in the circumstances, it is unreasonable that no or no greater provision was in fact made."

The result of the above was that for some time an adult child would be advised that he or she would not be able to make a successful claim unless her or she could show some sort of moral claim. More recently, however, the Courts have determined that no moral claim is needed before a successful claim can be made. That does not mean that the statement set out from Oliver J in **Coventry** is no longer good law.

In **Ilott** in the Supreme Court Lord Hughes stated at paragraph 20 that *"Oliver J's reference to a moral claim must be understood as explained by the Court of Appeal in both **Re Coventry** itself and subsequently in **Re Hancock**. There is no need for a moral claim as a sine qua non for all applications under the 1975 Act, and Oliver J did not impose one. He meant no more, but no less, than that in the case of a claimant adult son well capable of living independently, something more that the qualifying relationship is needed to found a claim, and that in the case before him the additional something could only be a moral claim. That will be true of a number of cases. Clearly, the presence or absence of a moral claim will often by at the centre of the decision under the 1975 Act. "*

In **Cameron v Treasury Solicitor** [1996] 2FLR the claimant was a former wife of the deceased who had not remarried. They had been divorced 19 years and lump sum had been paid to her by way of a clean break settlement. The deceased's estate was not large and passed bona vacantia to the Crown. The former spouse was in necessitous circumstances but this was held not to create any obligation on the deceased to provide for her on his death. Her claim failed. This shows that long estrangement may be an example of cases where needs will not be enough on their own for a claim to succeed.

Lord Hughes also made it plain that, even if the conclusion is that reasonable provision has not been made, needs are not necessarily the measure of the order which ought to be made. This is where the financial needs and resources of beneficiaries come into the equation. The competing claims of the beneficiaries may inhibit the practicability of satisfying the needs of the applicant in full. In addition the circumstances of the relationship between the deceased and the claimant may affect what is the just order to make. Effectively if the court comes to the conclusion that the will or intestacy does not make reasonable provision for the applicant then the Court tailors its award to what it is reasonable in all the circumstances taking into account the factors set out in section 3 of the Act including the nature of the relationship and conduct.

In Ilott at first instance the District judge came to the conclusion that the Will failed to make reasonable provision for the applicant and awarded £50,000. Mrs Ilott appealed. King J concluded that the District judge had fallen into the trap of considering whether the testator

had behave reasonably instead of applying the proper objective test and concluded that the Will did not fail to make reasonable provision for Mrs Ilott.

Mrs Ilott appealed to the Court of Appeal which concluded that the District Judge had not made the error King J had found but had applied the correct test and so the appeal succeeded. The Court of Appeal then remitted the question of quantum back to the High Court and Parker J upheld the District judge's order.

Mrs Ilott appealed the order of Parker J and so the matter went before the Court of Appeal for a second time. The Court of Appeal, LJ Arden giving the lead judgment, concluded that the District judge had fallen into two errors of principle in arriving at the award of £50,000 and chose to make its own evaluation. The Court of Appeal was much exercised by a perceived need to make provision which did not affect Mrs Ilott's benefits and made provision for £143,000 to buy the house in which she and her family were then living with an additional small lump sum. The Court of Appeal said that it was necessary to treat a Claimant who is in receipt of state benefits in the same way as a person who is elderly or disabled, as having for that reason and increased need for living expenses. The benefits, it held, *"must be preserved."*

LJ Arden referred to the position of the Charities as follows: *"The claim of the appellant has to be balanced against that of the charities but since they do not rely on any competing need they are not prejudiced by what may be a higher award than the court would otherwise make."*

The Supreme Court determined that the District Judge had not fallen into error as found by the Court of Appeal and reinstated the previous order. It again restated the principle that what the Court could award was what was reasonable for the applicant to receive in all the circumstances for her maintenance. If the provision of housing is to be made for a category of applicant where the limit on provision was governed by maintenance that would normally be by way of a life interest.

The Court of Appeal had found that the long period of estrangement carried little weight and neither did the deceased's clear wishes as set out in her Will and side letters. Little weight also attached to the applicant's lack of expectation of benefit in part because the charities had no expectation of benefit either. If that had been upheld in the Supreme Court it could have heralded a very difficult time for charities benefitting from legacies under wills particularly if the testators had no previous connection with the charities in question.

The Supreme Court said in this regard [paragraph 46]: *"The claims of the charities was not on a par with Mrs Illot. True, it was not based on personal need, but charities depend heavily on testamentary bequests for their work, which is by definition of public benefit and in many cases will be*

for demonstrably humanitarian purposes. More fundamentally, these charities were the chosen beneficiaries of the deceased. They did not have to justify a claim on the basis of need under the 1975 Act, as Mrs Ilott necessarily had to do. The observation, at para 61 of the Court of Appeal Judgment, cited above, that because the charities had no needs to plead, they were not prejudiced by an increased award to Mrs Ilott is, with great respect, also erroneous; their benefit was reduced by an such award. That may be the right outcome in a particular case, but it cannot be ignored that an award under the Act is at the expense of those whom the testator intended to benefit."

Lord Hughes continued in paragraph 47 *"It is not the case that once there is a qualified claimant and a demonstrated need for maintenance that the testator's wishes cease to be of any weight. They may of course be overridden, but they are part of the circumstances of the case and fall to be assessed in the round together with all other relevant factors. Lastly, for the reasons adverted to above, it was not correct that so long and complete an estrangement was of little weight."*

Reading between the lines as this issue was not before the Supreme Court one can see that had the Supreme Court being considering afresh the question of whether the Will failed to make reasonable provision for the applicant it might very well have decided that that it did not and so dismissed the claim and made no provision at all. See the speech of Lady Halle at paragraph 65. Lady Hale stated that she regretted the fact that the Law Commission did not reconsider the question of claims by adult children when they last looked at Inheritance Act claims in 2011.

In conclusion, therefore, the following principles apply

(a) Testamentary freedom is still a basic principle of English law

(b) What the testator wants as expressed in his or her will prevails unless a claim under the 1975 Act can be brought successfully

(c) An applicant must bring him or herself within one of the categories set out in the Act

(d) The applicant must satisfy the Court that the provision made by the Will or on intestacy was such that it failed to make reasonable provision for the maintenance of the applicant (save in spousal cases where the reference to maintenance is omitted

(e) That is an objective test and does not depend on who takes the estate under the Will

(f) It the Court concludes that the Will or intestacy fails to make reasonable provision for the applicant's maintenance then the court has to decide what provision should be ordered;

(g) The fact that the beneficiary under the Will is a charity or charities does not mean that their claim to keep some or all of their legacy carries no weight. They may have no personal needs but their reliance on bequests and their public interest activities are taken into account as is the fact that the wish of the testator was to benefit them.

The fact remains that the public tends to disapprove of the expenditure of large amount of legal costs by charities seeing to preserve a benefit at the expense of a family member. The public relations damage caused by litigation by charities, particularly litigation which is perceived to be unsuccessful is more extensive than the legal costs incurred themselves. Members of the public may be deterred from giving to a charity, whether in their lifetimes or on death because of a perception that the money they give may be used in paying lawyers rather than carrying out the aims of the charity.

The position of charities following **Ilott** in the Supreme Court is better than it was following the court of Appeal decision but even so careful consideration has to be given to the merits of any claim taking into consideration the size of the estate, the value of the claim and the potential costs as well as any adverse publicity. When advising an individual lay client who is a respondent to a 1975 Act claim it is very unusual to advise them that no offer of settlement should be made and that the claim should fight whatever irrespective of merits. Charities are in no different a position. There is no obligation on a charity to fight to preserve every penny left to them by legacy or given to them inter vivos. The merits of a claim may be extremely poor but if the claimant has no money and so could not satisfy any costs award the benefit to the charity will inevitably be reduced by the costs of the litigation. There is scope for settlement within the anticipated amount of those costs. Mediation can and, in my view, should also be attempted.

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