

"I'll leave it all to the Cats Home" - Do we really have testamentary freedom?

In England, the law does not dictate how you must provide for your family in your will. However, under the Inheritance (Provision for Family and Dependents) Act 1975, ('the 1975 Act'), certain categories of applicant – including adult children and co-habitees – are entitled to make a claim to receive a part, or all, of an estate. This is on the basis that the deceased's will (or on the distribution of their estate under the intestacy rules if there is no will), does not make reasonable financial provision for the applicant. For all applicants other than a surviving spouse, the test is what is reasonable in all the circumstances for their maintenance.

A recent case, *Ilott v Mitson* [2011] WTLR 779, concerned the estate of Mrs Melita Jackson who died on 10 July 2004 leaving a net estate of £486,000. She left her residuary estate to three animal charities. Her will made no provision for her only child, Heather Ilott. Mrs Jackson wrote a letter to accompany her will explaining that she had not left anything to her daughter because they had fallen out when, at 17, Heather left home to live with a man of whom her mother did not approve. Heather married the man and they had 5 children. They had only a modest income and lived in what was described as "straightened circumstances". Two unsuccessful attempts at reconciliation were made during the 26 years that followed before Mrs Jackson died.

In 2007 Mrs Ilott brought proceedings under the 1975 Act seeking a share of the estate. The district judge at first instance held that the disposition of the mother's estate under her Will was not such as to make reasonable financial provision for the daughter and awarded her £50,000 being what he considered to be reasonable maintenance in all the circumstances of the case for Mrs Ilott to receive.

Mrs Ilott appealed against the amount awarded to her and the charities cross-appealed. The High Court allowed the charities' appeal and dismissed Mrs Ilott's claim. On further appeal, the Court of Appeal upheld the judgement at first instance and left the amount of Mrs Ilott's inheritance to be decided separately by the High Court.

The court has wide discretion in this type of claim and must take into account a number of factors including the financial needs and resources of the applicant and the deceased's obligations and responsibilities towards the applicant and any other beneficiaries. In order to succeed with a claim under the 1975 Act, there is no need for an adult child to show that the deceased owed them a "moral obligation", however, in the case of an adult child who can earn his own living, it may be difficult to show that reasonable financial provision was not made.

One of the factors that influenced the judge in the Court of Appeal was that Mrs Jackson had disinherited her daughter out of spite. There was no evidence that Mrs Jackson had any connection with the charities or any particular love of animals.

Specialist advice should always be taken when writing a will, especially if an estate, or a large part of it is to be left away from family. Steps can be taken to limit the prospect of a claim being made. It is also vital that, should any dispute arise after death, early expert advice is taken on the rights of all concerned. Henmans' private client team have lawyers experienced in drafting wills in these circumstances and dealing with all aspects of disputes concerning estates post death.

Joint owners beware!

The recent case of *Jones v Kernott* [2011] underlines the importance of entering into a declaration of trust to confirm the shares of the owners in jointly held property. In that case, property was bought in the joint names of a cohabitating couple who were both responsible for the mortgage. They did not however enter into a declaration to set out the terms of their ownership. When they split up Mr Kernott stopped paying the mortgage. 18 years later, the question of their shares in the house came before the Supreme Court. It was held that there is a presumption that joint owners hold in equal shares. That presumption can though be displaced by showing that the parties had a different common intention when they bought the property, or that they later formed the common intention

that their respective shares would change. The starting point is for the Court to try and work out what can be inferred from the parties' conduct. If this does not yield results then the Court may impute an intention that has a fair outcome having regard to the whole course of dealings between the parties. In *Jones v Kernott*, the Court declared that Mr Kernott's share in the property was 10%.

A declaration of trust is a straight forward document which, if it is prepared at the time of a purchase by joint owners, avoids uncertainty and heavy legal bills if the matter of the ownership of shares has later to be determined by the court.

Agricultural Property Relief ('APR') and moving into a retirement home

In the case of *HMRC v Atkinson* [2011], the Upper Tribunal denied APR to the executors of a retired farmer whose estate included a bungalow standing on farmland. The land, farmhouse and bungalow were owned by the deceased and let on an agricultural tenancy to a family farming partnership. Mr Atkinson was a partner until his death in 2006. However, in 2002, he moved from the bungalow to a care home. Whilst he was staying in the care home, his partners attended the bungalow two to three times a week to collect the post, deal with frost and to access the water supply. Mr Atkinson continued to take part in discussions relating to the farm.

The Upper Tribunal said that for APR to apply there must be a sufficient connection between the use and occupation of

the property in question, and the agricultural activities being carried on on the land. On the facts of this case, there was no objective connection between the occupation of the cottage and the relevant agricultural activities. The bungalow was not therefore occupied for the purposes of agriculture immediately before Mr Atkinson's death, and had not been so occupied since it had become apparent that he would never be able to return there to live.

If a partner in a farming partnership no longer occupies a farm cottage and will never return, it is important to consider the level of agricultural activity being carried out on the premises and to adjust arrangements accordingly to ensure that the property still qualifies for relief.

Other retirement matters:

Winter fuel allowance

This year this tax free and non means tested allowance is worth £200 per household. If one of the persons eligible is over 80, this increases to £300. The allowance is linked to the current women's state pension age and so to be eligible you need to have been born before 1951. Men who are under their own state pension age, but born before 1951 are therefore eligible to claim. It is necessary to make a formal claim in the first year. You can find out more by calling the help line on 0845 915 1515.

State Pension Age

In the November budget statement it was announced that the state pension will rise by £5.50 to £107.45, which the Chancellor said was the 'largest ever' cash rise. However, against this, the state pension age is to rise from 66 to 67, eight years earlier than planned.

Tax Planning Gifts by Attorneys

Attorneys who, under a registered Enduring Power of Attorney or a Property and Financial Affairs Lasting Power of Attorney, manage the financial affairs of the donor of the power can make gifts from the donor's estate for the purposes of inheritance tax efficiency, provided they are authorised to do so by the Court of Protection.

In old age, a person's financial needs often become ascertainable and fixed for the rest of their life. If a person has moved into a retirement home, for example, his only outgoings are his care and accommodation fees and whatever he needs to pay for additional comforts. He may have sold a valuable family home and have a surplus of capital he will never need, but which will be subject to inheritance tax at 40% if left in his estate when he dies.

An attorney's authority to make gifts on behalf of a donor without reference to the Court of Protection is limited to seasonal gifts, birthday and other celebratory presents such as those given on the occasion of a wedding, and he may also continue charitable donations made by the donor. All these gifts must be proportionate to the value of the donor's assets.

The attorney must make an application to the Court of Protection for authority to make any other gifts. The application must demonstrate that the donor will be left with sufficient income and capital to provide for his needs comfortably for the rest of his life, and that the gifts do not have the effect of disinheriting beneficiaries who would otherwise benefit under the donor's will. Without Court authority, the gifts will be held to be void for inheritance tax purposes by H M Revenue and Customs.

An application can be made not only for gifts of capital, but also, for regular gifts out of income that are immediately exempt for inheritance tax purposes.

Veronica Cowdrey heads Henmans' Court of Protection team and deals with specialist applications to the Court including those for tax planning gifts. To discuss any issues raised by this article contact her by email at veronica.cowdrey@henmansllp.co.uk.

