Before you go...

Julie Butler highlights some practical points arising from *Ilott* v *Mitson* relating to will challenges and intestacy in England and Wales, and changes to the intestacy rules under the *Inheritance and Trustees' Powers Act 2014*

KEY POINTS

WHAT IS THE ISSUE?
Practical points arising from *Ilott* v *Mitson*, the changes to the intestacy rules via the *Inheritance and Trustees' Powers Act 2014*, and other recent developments.

WHAT DOES IT MEAN FOR ME?
The need to be prepared for challenges to wills and to try to put protection in place.

WHAT CAN I TAKE AWAY?
The interaction of quality instruction, protection and tax planning.

The England and Wales Court of Appeal decision in *Ilott* v *Mitson*[1] has provided fresh food for thought around will drafting. The facts have been well publicised in the press and can be summarised as follows:

- **Mrs Jackson wrote a will leaving her entire estate to animal charities, and a letter of wishes explaining why she did not wish her daughter, Heather, to benefit;**
- **Heather, the disinherited daughter, 'won' almost a third of her mother's estate by a claim for reasonable financial provision under the *Inheritance (Provision for Family and Dependants) Act 1975* (the 1975 Act);**
- **The Court of Appeal awarded Heather GBP164,000.**

Some commentators consider that the case wholly undermines the longstanding principle of testamentary freedom (i.e. the testator can leave their estate to whomever they like). However, the Court of Appeal found that Mrs Jackson had acted in an unreasonable, capricious and harsh manner towards her daughter. The charities have applied for permission to take this case to the Supreme Court for clarity in this area, and that request has been granted. The decision is awaited with interest.

THE REFRESHED INTESTACY RULES

FROM 1 OCTOBER 2014, THE INTESTACY RULES ARE:

SITUATION		
A SPOUSE/CIVIL PARTNER BUT NO CHILDREN	SPOUSE/CIVIL PARTNER RECEIVES WHOLE ESTATE	PARENTS/SIBLINGS DO NOT RECEIVE ANYTHING
A SPOUSE/CIVIL PARTNER AND CHILDREN	SPOUSE RECEIVES: • The first GBP250,000 • Personal chattels • Half of the estate outright	CHILDREN RECEIVE THE REMAINING HALF OF THE ESTATE AT 18
NO SPOUSE BUT CHILDREN	CHILDREN RECEIVE EVERYTHING IN EQUAL SHARES	
NO SPOUSE, CHILDREN OR RELATIVES	EVERYTHING GOES TO THE CROWN	

FUTURE CLAIMS

The *Ilott* decision does not necessarily indicate that courts are now more likely to ignore the provisions of a will. It may result, however, in more legacies to charities being challenged by disinherited children, even if they are not financially dependent on the deceased. It also shows that will drafting must be undertaken with the benefit of robust professional advice that incorporates inheritance tax (IHT) planning and understanding.

FENDING OFF CLAIMS

In the vast majority of circumstances, taking legal advice and drafting a clear will, accompanied by a detailed letter of wishes, will ensure that succession plans are realised and protect an estate against costly court battles.

Another method of protection is to leave a small gift under the will to anyone who might contest the will, so that they are discouraged from bringing a claim. A 'no-contest' clause could accompany that gift, meaning that, if the individual does contest the will, they will forgo the gift.

When a will is drafted and a solicitor observes obvious potential for claims under the 1975 Act, there must be a responsibility to warn the client of the risks; this can lead to a complex interaction of client instruction, tax planning and advice on protection against claims.

WILLS AND TAX PLANNING

Wills can be a significant IHT-planning tool for families, although perhaps less so for cohabitees (due to the lack of the inter-spouse exemption, which applies only to married couples and civil partners). Every individual is entitled to a nil-rate band (NRB) of GBP325,000 and, if no lifetime gifts are made, then, on death, the first GBP325,000 of the estate is taxed at 0 per cent and the excess at 40 per cent.

A key point, often overlooked, is that, from 2009, the deceased can use any of their late spouse's unused NRB. It is essential for all tax advisors to keep an eye on unused spousal NRBs. HMRC can ask for evidence of the exact amount.

From 2017, the main-residence NRB must also be taken into account. This measure introduces an additional NRB when a residence is passed on death to a direct descendent. There will be a tapered withdrawal of the additional NRB for estates with a net value of more than GBP2 million.

DEED OF VARIATION

Once a will is in place, the beneficiaries can, under current legislation, vary the will to make it suit the family in a more tax-efficient or beneficial way – this is known as a deed of variation. In the 2015 Budget, it was announced that the deed of

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THE IMPORTANCE OF A STATEMENT OF REASONS

Stephen Lawson TEP provided a much-needed update on the *Inheritance (Provision for Family and Dependants) Act 1975*, at the STEP Tax, Trusts & Estates Conference earlier in the year. Here is a summary of one of his key messages.

Under the 1975 Act, a will can be contested if the deceased failed to provide reasonable financial provision for someone who is eligible to bring a claim. If successful, other beneficiaries will receive less than they were originally bequeathed.

These claims can sometimes be avoided with a well-written will and an ancillary 'statement of reasons' to support its content. This approach is particularly prudent where the testator is excluding estranged family members. A statement of reasons that has been carefully drafted by the practitioner, and signed by the testator, will have gravitas and be considered by a judge when deciding whether to award provision.

In *Ilott* v *Mitson*, the statement of reasons was not determinative. With the benefit of hindsight, it could be seen that the statement of reasons that had been prepared was based on negative reasons as to why the claimant should be excluded – it did not emphasise positive reasons as to why the other beneficiaries should receive the bounty. As an illustration, if the testatrix had been a lifelong supporter of animal charities, this reason could have carried more weight.

In this case, the court could not establish who was at fault for the estrangement. It is very important to provide a concise and objective statement when a potential claimant is being excluded from a will, in case it is challenged later.

Although a well-drafted statement cannot be determinative, a court will take it into account when deciding whether a potential claimant has a valid claim.

'The intestacy rule changes may lead to an increase in claims from adult children who would have received a greater share of a parent's estate under the old rules'

variation would be reviewed. This review has not yet taken place.

INTESTACY RULE CHANGES

The *Inheritance and Trustees' Powers Act 2014* (the 2014 Act) came into force on 1 October 2014. The Act reformed the intestacy rules to suit what was considered the more 'modern family', and changes were also made to the 1975 Act.

Under the 1975 Act, certain categories of claimants can make a claim against someone's estate if they have not received reasonable financial provision under a will or intestacy. The 2014 Act improves the position on intestacy for surviving spouses, meaning that fewer spouses may need to make claims under the 1975 Act (see table opposite).

Ironically, however, the changes may lead to an increase in claims from adult children who would have received a greater share of a deceased parent's estate on intestacy under the old intestacy rules.

Furthermore, a person could previously make a claim if they were able to prove they were being maintained by the deceased. The 2014 Act removes the maintenance requirement. The claimant must now only show that the deceased contributed more to the relationship than the claimant did. It is no longer necessary to show that the deceased had formally 'assumed' responsibility for the claimant's maintenance. Instead, the court will take into account the extent to which the deceased had assumed responsibility for the claimant in deciding what constitutes reasonable financial provision.

The changes have expanded the possibility of claims to situations where the claimant and the deceased were mutually dependent on each other. For example, a member of a non-cohabiting couple where each had assumed some responsibility for the other, rather than the responsibility being all one way, might now be able to claim.

FINAL REMARKS

Complex family arrangements often lead to the threat of litigation and contentious probate situations. In addition, the current strength of house prices, especially in areas such as London, has contributed to the large number of high-net-worth (HNW) estates in the UK. Many such estates have the potential to be fought over by a diverse number of potential beneficiaries, including charities. Yet a large number of HNW families are not prepared for what can lie ahead. There is now a need for more awareness of such estate-planning problems. In fact, the need for practical, forward-thinking, STEP-qualified advisors who can help families with a holistic approach at an early stage has never been so pressing.

1 [2015] EWCA Civ 797

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