Lifestyle choices, mere busybodies, and picture frames

Adam Carvalho and **Richard McDermott** consider the courts' approach to claims brought under the Inheritance Act 1975 by adult children and creditors of beneficiaries

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There has apparently been a steady increase in reported claims under the Inheritance (Provision for Family and Dependants) Act 1975 – there were 116 reported cases in 2015, up from 15 in 2005. No doubt factors such as increased public awareness arising from press coverage of cases like *Ilott v Mitson* [2015] EWCA Civ 797, together with rising property values and thorny issues such as cohabitees' rights, have contributed to the trend. As practitioners will know, many claims will be settled at the pre-action stage.

Adult child cases continue to generate a certain amount of controversy. At its most extreme, testamentary freedom means that a person 'may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his Will, however much we may condemn the course he has pursued' (*Boughton v Knight* (1873) LR 3 P & D 64). This right is, however, balanced by the right of children of the deceased (whether adult or minor) to apply under the 1975 Act for further financial provision.

While some commentators point out that cases such as *Ilott* do not represent a significant departure from the terms of the legislation, others are concerned that testamentary freedom is slowly being eroded. We understand that *Ilott* will be reaching the Supreme Court before the end of the year. In the meantime, another 'adult child' case has attracted some attention because the application was dismissed in part due to the claimant's 'lifestyle choice'. *Ames v Jones and others* [2016] EW Misc B67 (CC) provides a useful illustration of this type of claim.

'Lifestyle choice'

The claimant in the case, Danielle Ames, was the daughter of Michael Ames' first marriage, which broke up when she was a young girl. Michael began his relationship with Elaine (Danielle's step-mother) in 1980 and lived with her for more than 30 years before they were married in 2001. Michael's 2005 will left his entire estate to Elaine if she survived him, failing that to Danielle (as to 40 per cent) and his four grandchildren (as to 60 per cent). Michael died in 2013 leaving an estate valued at around £1.05m.

Danielle, who had two teenage children with her long-term partner, had not worked since 2003. Until this point she had run the family business, Ames Frames, which had been given to her by Michael in the mid-90s. The deficit in her personal finances was never accurately assessed but ranged from £600 to £2,000 per month. Accounts varied over the closeness of Danielle's relationship to her father – Danielle said she idolised him, whereas Elaine said that father and daughter had a 'rocky and distant relationship'.

Mr Recorder Halpern QC was critical of Danielle's evidence, stating she was 'an unsatisfactory witness whom I found to be unreliable'. Elaine fared only a little better – as is often the case in such situations, she had not 'set out to embellish or invent facts', but she had 'convinced herself of her own narrative, which is not always accurate'.

The court found that leaving the estate to Elaine, and not to Danielle, was 'entirely reasonable, given that Danielle is an adult who is fit to work, whilst Elaine was [Michael's] wife and partner for over 30 years and is past working age'. The estate was not sufficient to support both Elaine and Danielle, and the widow's moral claim carried greater weight.

The judgment does not mark a significant evolution in the judicial approach to 1975 Act cases, but it is notable for Mr Recorder Halpern QC's statements regarding Danielle's unemployment. Noting that Danielle had not taken a job since leaving her framing business in 2003, the judge said that Danielle was 'capable of working and has failed to discharge the burden of proving that she is unable to work. I conclude that her lack of employment is a lifestyle choice. That alone is sufficient to defeat her claim.' >>

>>Validity challenge

Ames may provide parties concerned by the perceived erosion of testamentary freedom – and a growth in adult child 1975 Act claims – with some comfort. At the same time, another case may have opened up new possibilities for various categories of individuals, including potential applicants under the 1975 Act, to issue probate claims.

There is a longstanding requirement that (as the textbook that would become *Tristram and Cootes* said in 1881) 'the foundation of title to be a party to a probate or administration action is interest'. The CPR now states that a probate claim form must explain 'the nature of the interest of the claimant… in the estate'.

In many instances this will be relatively straightforward – an applicant will, for example, be a beneficiary of a will. In other instances, the question is more complicated – can an applicant under the 1975 Act, with no interest under the will, challenge the validity of that will? Can a creditor of a beneficiary?

In *Randall v Randall* [2016] EWCA Civ 494, Colin and Hilary Randall had agreed in a consent order on their divorce that if Hilary inherited more than £100,000 from her mother, she and Colin would share the excess equally. The consent order provided Hilary with a larger percentage of the liquid assets, while Colin retained the prospect of a modest lump sum from Hilary's mother's estate to supplement his small pension fund.

Hilary's mother's will left Hilary £100,000 – so there was no excess for Colin to share – and the rest of the estate (of around £150,000) went to Hilary's children. Colin challenged the will's validity on the basis of lack of due execution. Had Colin succeeded, Hilary would have inherited around £250,000 on the intestacy, so Colin would have received around £75,000.

The court examined, as a preliminary issue, whether Colin's position as Hilary's creditor under the consent order amounted to an 'interest' that allowed him to challenge the validity of the will. This was, as Lord Justice McCombe said, a 'point of probate practice of some novelty' – but with significant implications (as set out below).

At first instance the court took the traditional approach that only those entitled to administer the estate or share in its distribution have such an interest. Colin appealed.

Scope of the interest

Lord Dyson MR gave the leading judgment for the Court of Appeal. He drew a distinction between the respective positions of creditors of an estate and creditors of a beneficiary:

- A creditor of an estate is interested to ensure that there is due administration of the estate – which will, of course, include payment of creditors; and
- A creditor of a beneficiary is interested to ensure that the beneficiary receives what is due to them under the will so that the creditor has the best possible chance of being paid.

The Court of Appeal went on to examine two recent 1975 Act cases:

- In *Green v Briscoe* [2005] EWHC 809 (Ch), the deceased's former wife applied for provision from his estate and for a pronouncement against the validity of the will. The court concluded that the former wife's 1975 Act claim did not give her an 'interest' in the estate (which would enable her to challenge the will); and
- In *O'Brien v Seagrave* [2007] EWHC 788 (Ch), the claimant was the partner of the deceased. The court held she could bring a probate claim against the validity of the will because she had a 'clear and accepted financial interest in the outcome of [the] dispute and one would therefore in general expect her to have a right to bring [a validity] action'.

Lord Dyson MR held that the approach taken in *Seagrave* was correct – a person with a claim under the 1975 Act could bring a probate claim challenging the validity of a will even though that person may have no interest under the will or the intestacy rules.

Colin's counsel argued that the scope of the 'interest' required to enable a person to bring a probate claim should be 'delimited more broadly so as to include those whose interest lies in ensuring that a beneficiary receives the gift he should receive, in order to take a benefit whether directly or indirectly out of that gift'.

Lord Dyson MR agreed. A restrictive approach would mean that Colin had, in practice, 'no route by which his claim that the will is invalid [could] be brought before the court'. Colin was 'not a mere busybody. He has a real interest in challenging the validity of the will.' As McCombe LJ pointed out, otherwise a creditor would be unable to challenge (in probate proceedings) a will that had been forged to defeat a consent order.

This ruling has introduced welcomed clarification, and widened the class of individuals who can potentially launch a probate claim. Will-drafting solicitors may wish to explore whether there are potential creditors or 1975 Act applicants who may now have an 'interest' enabling them to mount a validity challenge and, if so, whether planning should be put in place. **SJ**

> **Can an applicant under the 1975 Act, with no interest under the will, challenge the validity of that will?**