Wishing away

Richard McDermott and **Adam Carvalho** discuss recent estate planning case law, including an undisclosed lifetime gift, proprietary estoppel, and will drafting

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The case of Timothy *Clayton Hutchings v HMRC* [2015] illustrates HM Revenue and Customs' (HMRC) strict penalty policy regarding undisclosed lifetime gifts and the steps executors must take to protect themselves.

Robert Hutchings ('Mr Hutchings') had five children, including Timothy Clayton Hutchings ('Clayton'). Mr Hutchings owned a farm in West Sussex from which he operated a number of businesses, including a 'mobile disco'. He also had an account with the Swiss private bank Julius Bär. In 2009, Mr Hutchings instructed the bank to transfer the £443,669 in this account to Clayton's account with the bank. HMRC was not aware of either account.

Following Mr Hutchings' death in October 2009, two professional executors were appointed. They met with family members, including Clayton, later in October 2009 and asked for details of any lifetime gifts made to the family by Mr Hutchings. The request was reiterated by letter in November 2009. Clayton did not provide details of the £443,669 gift.

The executors submitted an inheritance tax (IHT) return in March 2010, which made no mention of the gift (which had been made seven months before Mr Hutchings' death). The executors assumed the estate was entitled to the nil-rate band. In July 2011, HMRC was informed anonymously that Clayton had an offshore bank account. HMRC sent challenge letters to Clayton and the executors in July and August 2011 respectively.

On 21 September 2011, the executors wrote to HMRC stating that they had been 'seriously misled about this gift'. They filed a revised IHT400 form. IHT was assessed on Clayton personally in the sum of just under £47,000 (the nil-rate band was applied to the gift). HMRC also indicated that it would charge a penalty of 50 per cent of the potential lost revenue that arose from the executors' additional liability. Clayton appealed.

A penalty is payable when a person gives HMRC a return which contains a deliberate or careless inaccuracy which amounts to or leads to an understatement of a liability to tax (under schedule 24 of the Finance Act 2007). The IHT400 contained an inaccuracy, but the question was whether this was due to the executors' carelessness or Clayton's deliberate behaviour.

The First-tier Tax Tribunal found the executors' letter setting out the information they required to comply with their duties had been 'very clear'. The executors were criticised by Clayton for failing to carry out an adequate search of Mr Hutchings' house for documentation, but the tribunal found that they were not expected to search the house for every document and were entitled to rely on information provided by the deceased's family and advisers.

Clayton also criticised the executors for failing to chase him for a response to the November letter, but the court found the executors 'could not force people to reply'. The tribunal found Clayton's suggestion that the executors should have raised queries with banks, including those with whom they had no reason to suspect the deceased had kept an account, 'utterly unreasonable'. These findings will provide some comfort to executors in similar positions.

Finally, the tribunal found Clayton must have realised that cash held by a British citizen in a foreign bank account might be subject to UK tax, and the reason he failed to disclose the account to anyone was he did not intend to pay tax on the money. Clayton was therefore liable to a penalty >>

>> under paragraph 1A of the Finance Act because the executors' return contained an inaccuracy caused by his deliberate withholding of information with the intention that the IHT400 would contain the inaccuracy.

The case emphasises the importance of ensuring that correspondence with beneficiaries clearly sets out their obligations with regard to providing information required for the IHT return and ensuring that reasonable searches for documentation are carried out.

The 'cowshed Cinderella'

Practitioners may recall a case involving a litigant dubbed the 'cowshed Cinderella'. That case now appears to be close to a conclusion.

In 2014, the Court of Appeal in *Davies v Davies* [2014] EWCA Civ 568 upheld the High Court's earlier decision allowing a claim for proprietary estoppel by Ierian Davies ('Ms Davies') against her parents.

Ms Davies had worked for her parents, for little or no payment, on a dairy farm since childhood. Not unusually, she was told by her parents that (among other things) 'the farm would be hers one day'. Ms Davies later left the farm, and her parents updated their wills to provide that the farm would be divided between Ms Davies and her two sisters. Ms Davies claimed that she had worked on the farm (and suffered detriment under various heads, which are discussed below) on the understanding that it would be left to her alone, and that the parents were therefore estopped from leaving it to all three children.

Ms Davies' claim succeeded, with the court holding that detriment was not defined by the difference between what the claimant was worth to the business and what they received from it, but by how well the claimant could have done elsewhere. Relevant factors for these purposes included quality of life, enjoyment of work, social interactions, and financial reward.

The court provided that the extent of Ms Davies' entitlement should be decided in a subsequent hearing. That hearing has now taken place at the High Court in Cardiff and Ms Davies has been awarded £1.3m in settlement of her claim. This represents approximately one-third of the value of the farm – which should be sufficient to enable her to start a new farming business of her own, but is clearly far less than she had originally expected. It is hoped that the court's reasoning will be explained in a detailed judgment shortly.

Fielden v Christie-Miller and others [2015] EWHC 87 (Ch) also considered a claim for proprietary estoppel, this time in connection with two discretionary trusts of land in Oxfordshire which were collectively known as the Swyncombe estate. In particular, the case considered the extent to which representations made by one trustee were binding on the trustees as a whole.

For a claim in proprietary estoppel to succeed, the claimant must show more than just a reasonable belief that the trustee making the representation was authorised to act on behalf of all the trustees: they must either prove that the trustee was so authorised, or that the other trustees had acquiesced in the representations or caused the trustee to appear to be so authorised.

The spate of proprietary estoppel claims continued with *Lothian v Dixon* (2014) Ch D. The claimants were successful in this instance and were awarded the deceased's entire estate. The facts are relatively straightforward: Mr and Mrs Lothian managed the deceased's hotel during the final stages of her life, as well as living with and caring for her during the final stages of terminal illness. The deceased promised the Lothians her final estate in return but ultimately failed to sign a will to this effect (despite instructing her solicitor to prepare one). Mr and Mrs Lothian successfully argued that the entire estate should pass to them.

Will-drafting guidance

In *Reading and another v Reading and others* [2015] All ER (D) 64, the will in question defined the beneficiaries as 'my wife… and any issue of mine who are alive at the start of or born during the trust period'. The trustees sought a declaration for the word 'issue' to be construed as including not only the deceased's children but also his step-children and their children. The court agreed with this interpretation, which avoided the need for an application to rectify the will to include the deceased's step-children (and their children) in the beneficial class.

Finally, in October 2014 the Law Society issued guidance on the formalities for preparing a will (or lifetime gift) which benefits a partner in the same firm. This led to widespread concern, as the guidance suggested that the client should obtain independent legal advice whenever, for example, a partner or a family member of a partner was given more than 1 per cent of the estate.
In response to this, the guidance was updated, and a revised version has now been published.

Helpfully, the guidance no longer provides that independent legal advice should be obtained where a client proposes to make a gift of a significant amount to a partner (or family member of a partner) of the firm. However, it does provide that a firm's compliance officer for legal practice or a senior member of the firm should be consulted before the will (or lifetime gift) is prepared, to determine whether the firm should act without independent advice having first been obtained. SJ

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