Ilott v Mitson: Is it ever possible to prevent an attack on a client's will?

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Readers may have seen a spate of press reports of the case of ***Ilott v Mitson***, which was heard by the Court of Appeal in July last year. The case generated significant controversy which centred around an estranged daughter's claim for financial provision from her mother's estate, which was successful despite the fact that her mother wanted all of her assets to pass to a number of charities. Last week the Supreme Court indicated that the charity beneficiaries have been given permission to appeal the judgment. This will be the first time that a case under the Inheritance (Provision for Family and Dependants) Act 1975 (commonly called the "1975 Act") is heard by the Supreme Court.

After the Court of Appeal judgment was published last year, many reporters expressed concern that the principle of testamentary freedom had been eroded. Ahead of the Supreme Court hearing, we consider whether this view is correct and if so what steps a client (and their professional advisers) can take to minimise the risk that their Will will be attacked after death. We begin with a short summary of the case and the legislation which enables family members and dependants to seek a greater share of a client's estate.

The Inheritance (Provision for Family and Dependants) Act 1975

English law, unlike the law of almost all other EU states, provides that a client is free to choose to whom they leave their estate after death. This is a relatively recent development; it was only with the Dower Act of 1833 that an English person acquired this "***testamentary freedom***". At its most extreme, testamentary freedom means (as the court noted in an 1873 case) 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***".

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In the early twentieth century, prompted by disinherited spouses and children throwing themselves on the State for support, Parliament passed legislation which allowed a surviving spouse, a son who was under 21 or disabled, and a disabled or unmarried daughter to apply to court for financial provision from a deceased person's estate. In light of the social changes over the twentieth century, the categories of potential applicants have subsequently been widened. The 1975 Act now allows applications to be made by spouses or civil partners; former spouses or civil partners; any person who was treated as a child of the family; a person who was maintained by the deceased; a cohabitant who was living with the deceased as their spouse; and "any child of the deceased", whether that child is still a minor or has reached adulthood.

In order to secure provision from a deceased's estate, the applicant must first show the court that the Will (or intestacy rules, where applicable) does not make "***reasonable financial provision***" for him or her. If the applicant is not a spouse or a civil partner – for example, adult children of the deceased – then he or she is only entitled to apply for such provision from the estate as is necessary for his or her 'maintenance", ie provision to enable him or her, directly or indirectly, to discharge the cost of daily living at whatever standard is appropriate. The case law shows that it can be difficult to define this level of provision; it inevitably involves a "***value judgment***".

If the court concludes that the Will does not make reasonable financial provision for the applicant, the court must then consider what provision to make, having regard to a number of factors including the financial needs and resources of the applicant; the family resources and needs of any other family members or beneficiaries of the Will; the size of the deceased's estate; and any obligations or responsibilities owed by the deceased to the applicant. The court may also take into account any other matter which in the circumstances it considers relevant, including the deceased's testamentary wishes (which will usually be encapsulated in his or her Will).

It should be noted that there are other ways for a disappointed beneficiary to challenge the distribution of a deceased client's estate; for example, it could be argued that the client lacked mental capacity to sign their Will, did not know or approve its contents and/or that they were subject to undue influence at the time of signature. The merits (or otherwise) of such challenges have been considered in other Farrer & Co briefings and for these purposes it will simply be assumed that the solicitor who prepares the client's Will is very much alive to such potential challenges.

Ilott v Mitson: the facts

The relevant facts, which are rather stark, are as follows:

- Heather Ilott was the only daughter of Melita Jackson. Mrs Jackson married her husband in 1956 but he was killed in a road traffic accident before Mrs Ilott's birth.
- Mrs Ilott left home at 17 to live with her boyfriend, who subsequently became her husband. Mrs Jackson had always disapproved of the man and wished the relationship would end. As a result Mrs Ilott and Mrs Jackson became estranged. They had three attempts at reconciliation which ultimately failed because their differences could not be resolved; the court found that the only apology which would have satisfied Mrs Jackson would have been a rejection by Mrs Ilott of her husband.
- Mrs Ilott and her husband had five children. Mrs Ilott did not work. The family survived largely on state benefits and tax credits. As a result of the family's straitened circumstances Mrs Ilott had never had a holiday, had difficulty affording clothes for her children and was limited in the food she could buy.
- Mrs Jackson made a Will leaving her residuary estate to three charities. Her solicitor realised this might lead to a 1975 Act claim by Mrs Ilott. Mrs Jackson therefore wrote to Mrs Ilott stating that she did not want her to receive anything from her estate. The letter stated that Mrs Ilott had made "no effort to reconcile" and was not "financially reliant" on Mrs Jackson.
- Mrs Jackson died in June 2004 leaving a net estate of around £486,000, and Mrs Ilott issued a claim under the 1975 Act.

Ilott v Mitson: the judgments

Mrs Ilott's claim was heard initially by the High Court in 2011. The High Court found that Mrs Jackson's Will did not make reasonable financial provision for Mrs Ilott in light of Mrs Ilott's financial circumstances, the size of the estate and the fact that the charities could not be said to have any competing financial needs. It found Mrs Jackson's conduct towards her daughter was ***"harsh and unreasonable***" and Million DJ awarded Mrs Ilott a lump sum of £50,000 to provide income to supplement her family's welfare benefits. The remainder of the estate (around 90%) passed to the charities.

Mrs Ilott appealed the judgment. The history of the appeal is beyond the scope of this briefing, but it ended in the Court of Appeal which approved the High Court's original judgment that Mrs Ilott was entitled to a share of her mother's estate and increased that share from £50,000 to £143,000. The Court of Appeal acknowledged that deciding whether a Will makes reasonable financial provision for an applicant involves making a value judgment and that the case law ***"reveals a struggle to articulate, for the benefit of the parties in the particular case and of practitioners, how that value judgment has been, or should be, made on a given set of facts***."

The Court concluded that reasonable financial provision could only be made for Mrs Ilott by providing £143,000 (which would enable her to purchase her housing association property) with the option to take a further £20,000 from the estate to supplement her benefits. By purchasing the property Mrs Ilott's annual liabilities would be reduced and give her the possibility of raising funds if necessary by equity release, while the provision of capital would not affect her tax credits.

Analysis

Commentators have suggested the decision has eroded the principle of testamentary freedom. In fact, the court took Mrs Jackson's wishes into account, but these were balanced against the need to ensure that reasonable financial provision was made for Mrs Ilott's maintenance in circumstances where the charities had no demonstrable need (or expectation) for any such provision, and anything they received would be a windfall.

Under the law as it now stands, an adult child who is employed or capable of finding employment will still find it difficult to succeed with a claim under the 1975 Act. Nonetheless, clients (and their professional advisors) will of course wish to minimise the possibility for any dispute to arise after their death. If a dispute arises, then usually the disgruntled beneficiary's solicitors will write to the executors and the other beneficiaries setting out their client's potential claim. The parties are encouraged under the relevant procedural rules to attempt to settle their differences without issuing formal court proceedings. The majority of disputes under the 1975 Act settle without the need for a trial, but such disputes inevitably lead to legal costs, delay the estate administration and can harm family relations. It is impossible to eliminate altogether the risk of a dispute post-death, but the risk can be minimised by taking some or all of the following steps when making a Will:

- Instead of disinheriting an adult child (or other beneficiary), the client may wish to consider leaving them a modest legacy. This may (depending on the personalities involved) discourage them from making a challenge.

- If the client wishes to benefit people or charities at the expense of family members, it is sensible to choose beneficiaries with whom the client has established a connection during their lifetime and to ensure that the solicitor's file records all the details of the connection. This might include evidence of gifts to the charity or other beneficiary made during the client's lifetime.
- Clients may leave a statement (or letter of wishes) explaining their decisions. Such statements should be drafted in reasonable terms, explaining the client's choices by reference to facts and avoiding airing accusations or old grievances (as Mrs Jackson's letter had done).
- The client may wish to leave their estate in a discretionary trust which would give their executors flexibility to decide how their estate should be distributed in light of all the circumstances at the time of death. The executors should be guided by the client's wishes and these can be set out in a detailed letter of wishes accompanying the Will.

Commentators have suggested using non-contest clauses in Wills. These state (in general terms) that if any beneficiary contests the Will then the estate will pass to different beneficiaries. It would be necessary to provide some benefit to the relevant individual under the Will (so that the individual has an incentive not to raise a challenge). This may enflame the situation, and such clauses cannot oust the court's jurisdiction to make financial provision for an applicant under the 1975 Act.

- The Will draftsman should always take a detailed note setting out the client's reasons for his or her testamentary choices. Where a family member challenges a Will, the solicitor's file notes are likely to provide a large proportion of the evidence as to why the client chose to make a Will in those terms. ***Ilott v Mitson*** provides a good example; without evidence regarding the estrangement between mother and daughter, Mrs Ilott might have received a greater share of the estate.
- The client should keep their Will under regular review and update it if and when their circumstances change. The client's professional advisors should, of course, be alive to any changes to the client's situation and be proactive in suggesting solutions.
- A final point is that the 1975 Act only applies if the client was domiciled in England and Wales on their death. So if the client was domiciled in another jurisdiction then it will not be possible for a claim to be brought under the 1975 Act.

Conclusion

In the words of former President of the Family Division of the High Court, Baroness Elizabeth Butler-Sloss (in the recent case of ***Barrass v Harding***), "***We still live in a world where, to some extent at least, a man or woman is entitled to dispose of his or her assets by Will as he or she chooses***" (our emphasis).

Mrs Ilott's case has highlighted the need for clients and their advisers to consider potential applications under the 1975 Act when making a Will. In the emotional period following the death of a parent, the discovery that a beneficiary has received unexpected or unwelcomed provision under a Will can often lead to disputes. The best approach to preventing such disputes will usually be to give careful thought to any such decision, to ensure that detailed records are kept, and if possible to address the issues with family members when the Will is made.

If you require further information on anything covered in this briefing please contact Adam Carvalho (adam.carvalho @farrer.co.uk; +44(0)20 375 7170), Richard McDermott (richard.mcdermott @farrer.co.uk; +44(0)20 375 7229) or your usual contact at the firm on 020 3375 7000. Further information can also be found on the Private Wealth page on our website.