

## Testamentary freedom – is it at risk?

On 3 July 2015 the Court of Appeal handed down its judgment in the matter of [\*Ilott v Mitson\* \[2015\] EWCA Civ 797](#) and awarded a sum of money to the estranged and disinherited daughter of the deceased.

The judgment has been quoted in the press as an indication of the erosion of testamentary freedom (see the Telegraph headline; [\*“Your will can be ignored, say Judges”\*](#)).

In fact, nothing has changed.

The judgment was made in the context of an application by the adult daughter of the deceased pursuant to the Inheritance (Provision for Family and Dependents) Act 1975.

This Act of Parliament allows certain categories of claimant to bring a claim for financial provision from an estate where a will (or intestacy) does not make sufficient financial provision for them. This is a remedy in which the Court will exercise its discretion to determine whether reasonable financial provision has been made, and if it has not, assess what is reasonable provision.

In this case the testator left her entire estate to charity; her daughter, the claimant, was to receive nothing. The claimant was in dire financial circumstances and reliant on state benefits to support her family.

The Court at first instance held that the claimant should receive a sum of £50,000 from an estate of approximately £486,000. On the first appeal, this award was upheld, even though it was acknowledged that the claimant would have to reduce her capital to £16,000 to retain her state benefits.

On the second appeal to the Court of Appeal it was held that the District Judge had made two errors of judgement. District Judge Million had stated that the award should be limited because the claimant had the ability to live within her means and had no expectations, but did not explain what the award might have been but for those factors. There is no way to judge what deductions were made as a result of those factors. There was also no assessment of what effect the award would have on state benefits.

The Court of Appeal concluded that it was appropriate to set aside the original award, and to re-consider the matter.

In reaching its decision, account was taken of all factors set out in section 3 of the Act including the needs and resources of the claimant and the beneficiaries (the charities), the size of the estate and any obligations on the part of the deceased.

The Court of Appeal considered the fact that:

- the charities did not put forward any case for their own resources and needs to be taken into account. Any legacy to them was stated as a ‘windfall’ and there was therefore no competing need to take account of in this case
- any award would have to take account of and preserve the claimant’s state benefits

- the claimant's financial circumstances were so limited, they outweighed any importance that could be attached to the fact she was an independent adult child
- living within one's means did not necessarily exclude a claim or impose a ceiling on any award under the Act
- a lack of expectation of inheritance did not really add much to a claim either way
- Parliament had given the Court the power to ensure that certain claimants received reasonable financial provision and that was to be balanced against the position of other claimants or beneficiaries and the wishes of the testator.

It is not considered that this is particularly new or ground breaking. The Court of Appeal simply applied the provisions of the Act to the specific facts of this case.

Had there been other (non charity) beneficiaries, or had the claimant not been in such a financially precarious position, the award may have been very different.

It is true to say that probate disputes are on the increase and that disinherited beneficiaries are more likely to challenge a will or bring a claim than they would have 50 years ago. Further, as the law currently stands, it is very difficult to exclude the possibility of a claim in its entirety. If a testator does intend to disinherit a relative, it is always worth taking advice to try and see how best to avoid post-death litigation.

For more information, please contact:

**Alison Regan**

Partner

+44 (0)20 8394 6549

[Alison.Regan@russell-cooke.co.uk](mailto:Alison.Regan@russell-cooke.co.uk)

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