Welcome

This month’s issue has been largely written by Arline Lester, a solicitor in our in-house claims team. Arline has over 25 years’ experience as a solicitor and, prior to joining Zurich over 10 years ago, was a partner in private practice and also a risk and compliance manager for a large West End firm. Arline continues to take an active interest in risk management issues and co-wrote @risk in July 2014 in the brief period between Andrew Nickels’ retirement and Michael Blûthner Speight taking over as Risk Manager.

This month’s issue deals largely with the recent decision in Heather Ilott v David Robert Mitson and others [2015] EWCA Civ 797 concerning the Inheritance (Provision for Family and Dependents) Act 1975, and gives a number of examples of claims we have faced which have been brought involving this Act, as well as setting out several useful practice points to consider to reduce the risk of you facing claims of this nature.

Finally, we also look at the courts’ current view on litigants refusing to engage in mediation, even in cases where a mediation is unlikely to be successful owing to the position adopted by the other party (or parties) and even in cases where the client is extremely likely to succeed in full at trial in any event.

Michael Blûthner Speight
It’s easy to disinherit your children, isn’t it?

Traditionally, August has been referred to by the press as ‘the Silly Season.’ With Parliament in recess and large numbers of journalists and readers on holiday, a story that might otherwise have made it only to the inside pages can become big news.

And such has been the case recently with the excitement generated by the Court of Appeal decision in Heather Ilott v David Robert Mitson and others [2015] EWCA Civ 797.

Mrs Jackson died leaving a net estate worth £486,000. In her will, she left one small pecuniary charitable legacy and the residue to three charities, Blue Cross, RSPB and RSPCA. She made no provision for her daughter, Heather Ilott, who had been estranged from her mother for 26 years after leaving home at the age of 17 to live with, and subsequently marry, a man of whom Mrs Jackson did not approve. The Ilotts had five children; they lived in a right to buy council house and relied largely on benefits.

Alongside Mrs Jackson’s will were two side letters making it clear why she was leaving nothing to her daughter and requiring her executors to defend any claim Heather might bring. Heather did, in fact, pursue a claim under the Inheritance (Provision for Family and Dependants) Act 1975 (“the Inheritance Act”). At first instance, the District Judge ruled that it was unreasonable for Mrs Jackson’s will to make no provision for Heather, and awarded her £50,000 from the estate. Before the hearing, the charities had made an offer of settlement which Heather declined. In light of this, the District Judge also ordered her to pay the charities’ costs out of her award. As a result, there was little left for Heather who, unsurprisingly, appealed to the High Court. The charities cross appealed, and this time the judge found in their favour and overturned the decision at first instance.

Heather appealed again. The three justices of the Court of Appeal found unanimously in Heather’s favour. Although they considered that the District Judge had erred in determining the amount to be awarded (and this element was set aside) they held that he had correctly directed himself as to the question to be decided by reference to the relevant factors to be taken into account under section 3(1) of the Inheritance Act, these being:

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;…
(b) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
(c) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;
(d) the size and nature of the net estate of the deceased;
(e) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

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The Court of Appeal awarded Heather £143,000, representing the cost to her of buying the council house in which she and her family was living.

There has been much consternation about this decision, and numerous letters to the press. Some journalists have fulminated about the injustice to the late Mrs Jackson whose clear wishes have been thwarted. Presumably, even though the Inheritance Act has been around since 1975, they have never heard of it.

Those of you who deal with wills and probate will, however, be well aware of the Act and will have given advice to clients who were intent on disinheriting anyone who could be entitled to make a claim that (i) it is open to these individuals to make an application under the Inheritance Act; (ii) the Court has power to make provision for them from the estate; and (iii) in order to seek to thwart any potential application, they should set out, in a side letter, good reasons why they were making no provision for that person in the Will.

Although Ilott does not make new law, following this case it seems to us that there is now a risk that providing this advice will likely not go far enough. We consider that clients should now be told that, whilst it remains good sense to have a side letter, this will not guarantee that a Court will not ignore their wishes and make provision for an applicant from the estate in any event. They should also be advised that the Court can also order that costs of an Inheritance Act claim must be paid by the estate and that this will diminish its overall value. As always, this advice should be confirmed in writing.

It may be the case that successive governments, and the general public, see no problem with unregulated will writers but we know, only too well, the potential pitfalls in this area of law. By way of example we set out below some of the claims that we have dealt with in recent times concerning this area:

**Claim example – Failing to advise a client properly of the provisions of the Inheritance Act**

Pre Ilott, we dealt with a claim by the disgruntled children of a testatrix who were beneficiaries of their late mother’s will. Their father had died some years earlier, and their mother, the testatrix, had remarried in later life. She told her solicitors that she wanted her children to inherit the whole of her estate. The solicitors drafted the will in accordance with her wishes, leaving nothing to her second husband. After her death, he made an Inheritance Act claim which the children defended to trial. The court found in the husband’s favour and ordered costs to be paid out of the estate. The solicitor had not advised their late mother about the Inheritance Act and we had to settle the claim for a sum equivalent to the costs of the underlying Inheritance Act claim.

**Practice Point**

Whenever you are acting on instructions to prepare a will for a client, you should ask the right questions to identify whether any potential beneficiary under section 1 of the Inheritance Act is being left out. Once you have established that there is such a person, the client should be advised about the potential implications of the Inheritance Act.
Claim example – Failing to ensure a will is executed before the testator’s death

A solicitor, (“S”) was instructed to draft a new will for a client, to provide for her son to receive 45% of the residuary estate absolutely and 10% on trust for her grandson. S responded promptly to the instructions, obtained a copy of the original will and wrote to the client suggesting a discretionary trust instead. He explained that this would protect the intended beneficiaries from losing benefits. He asked the client to contact him to discuss further.

Over a month later, the client wrote to S, asking for an explanation of discretionary trusts. She explained that she was in poor health and likely to die within the next twelve months. She provided her telephone number. S responded to the letter explaining the nature of the trust he was proposing. There was then a long period when he heard nothing from the client. Ultimately, some three months later, the client responded saying she was considering the matter and would revert to him again. Three weeks later it was agreed that a draft will incorporating the discretionary trust would be prepared. S sent a draft to her the following day but the next contact was from her son advising him that his mother was in hospital, was not fit enough to make a new will, but might recover at a later date. S informed the son that, if his mother didn’t recover, it might be possible to set up the discretionary trust by way of deed of variation. There were no further discussions before the client died about a week later. Not until two years had passed did the question of executing a deed of variation arise again. By this time, it was too late to do so and the son made a claim against the insured for (i) delay in dealing with the will and (ii) failing to advise about the time limits for registering a deed of variation. The insured owed a duty of care to his client’s son, as intended beneficiary, following White v Jones [1995] UKHL 5.

Although it might have been possible to defend the son’s claim based on delay in obtaining an executed will – given that much of the delay was caused by the client and not S – there was no defence to the failure to advise of the applicable time limits.

Practice Point

• Make sure that you deal expeditiously when you are instructed to draft a new will.
• If your client fails to respond to correspondence, chase him or her up by way of a telephone call. This is particularly important if you know that your client is elderly or ill.
• If there are good reasons why a deed of variation should be considered, advise the beneficiaries at an early stage and remind them of all relevant time limits.

Claim example – Failing to sever a joint tenancy

Mr F and Mrs E, at that time cohabitees, consulted their solicitor (“P”) regarding the transfer of Mrs E’s property into their joint names. They instructed P that they wished to own the property as joint tenants. Shortly afterwards Mr F and Mrs E consulted P about making wills. There was a clause in each will which provided for the property to be held in trust for each other for life with a gift over in equal shares to Mrs E’s children. Mrs E subsequently died, and Mr F instructed P to deal with the administration of her estate. Initially, notwithstanding P’s earlier instructions, he did so under the misapprehension that the property was held as tenants in common. Ultimately the true position came to light and the gift over to her children failed. The children brought a claim against P for failing to have advised Mrs E to sever the joint tenancy.

In Helen Carr-Glynn v Frearsons (A Firm) [1998] 4 All ER 225 the Court of Appeal found that the solicitor who (in similar circumstances) had failed to advise his client to sever the joint tenancy was negligent. It was held:

“The ease with which a joint tenancy can be converted into a tenancy in common was one of the simplest procedures in an area of law where the procedures are not always simple. All [the testatrix] had to do was to write the requisite letter.. [The solicitor] was plainly negligent in failing to advise the sending of a letter of severance once she appreciated that she was unable to discover the nature of the existing joint ownership…had [the solicitor] given the advice to send a letter of severance clearly [the testatrix] would have accepted it…”

Practice Point

• When jointly-owned property is intended to pass to a beneficiary, always check whether the property is held as joint tenants or tenants in common.
• Do not simply take the word of the testator or testatrix. Obtain official copy entries to verify the position.
• If the property is owned as joint tenants, give clear instructions to the client, ideally accompanied by an appropriate draft letter, to sever the joint tenancy to give effect to the client’s wishes.
Claim example – Taking instructions from a beneficiary

A testator (“M”) and his second wife (“N”) held their matrimonial home as tenants in common. M’s will provided for N to live in the property during her lifetime with a gift over for the children of M’s first marriage.

Some ten years later M discovered that he was suffering from a terminal illness and was hospitalised. N consulted M’s solicitor, (“L”) and asked him to tell her what arrangements had been made in her husband’s will in relation to the house. L told her the terms and suggested that she should discuss the matter with her husband and consider whether his share should go to N absolutely instead. Shortly afterwards, N informed L that her husband wished to change his will. L prepared a draft codicil, in the terms proposed, ready for execution.

N collected the codicil from L and sent it to her husband’s doctor. She asked him to visit M in hospital and witness the execution of the codicil. The doctor complied with her wishes and the codicil was executed. Following M’s death, the children from his first marriage claimed that L failed to establish from M, directly, that the provisions were in fact in accordance with his wishes.

In a situation where a testator makes a will on the basis of instructions given to him by a beneficiary, this can be a ground for raising issues of want of knowledge and approval. The outcome will depend on the available evidence of the circumstances surrounding execution.

Fortunately, in this case, there was fairly convincing evidence that M had intended to make the changes dealt with by the codicil, but the case demonstrates the importance of making sure that, where instructions are taken from a beneficiary, care is taken to ensure that, at the time of execution, the provisions made are in fact in accordance with the testator’s true wishes.

It is good risk management practice that, if instructions are received from a third party, a solicitor should obtain written instructions from the client also and, in cases of doubt, the solicitor should make arrangements to see the client in person.

Practice Point

If you are instructed by a third party:

• Obtain written instructions from the testator wherever possible.

• Make arrangements to attend the testator yourself, if possible, to satisfy yourself that the newly-drafted will is in accordance with his or her wishes.

• If personal attendance is not possible, advise the third party that, in their absence, an independent person should attend the testator at the time of execution and satisfy themselves that the provisions accord with his or her wishes.

• Additionally (although not relevant in this case) where a testator is elderly, or very ill, a doctor should be asked to attend to ensure that the testator has sufficient capacity to execute any relevant documentation.

Allegations of lack or want of knowledge and approval, lack of capacity or undue influence often give rise to challenges to a will. Where the solicitor instructed to draft the will has not taken sufficient care to protect him or herself, a claim is likely to be brought seeking to recover, at the least, any litigation costs.
You may be aware of the potential costs risks of your client failing to agree to mediation or some alternative form of alternative dispute resolution (“ADR”). In the case of Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, the Court of Appeal held that:

the burden was on the unsuccessful party to show why there should be a departure from the general rule on costs in order to deprive a successful party of some or all of his costs on the ground that he had refused to agree to an alternative dispute resolution”.

The issue here is of course whether the successful party had, in so refusing, acted unreasonably. There have been a number of cases over the past couple of years (e.g. PGF II SA v OMFS CO 1 Ltd [2013] EWCA Civ 1288 and Jane Laporte and Nicholas Christian v Commissioners of Police [2015]EWHC 371 (QB)) where, in circumstances where a party has succeeded entirely at trial, the courts have nevertheless refused to award costs in full because there has been a failure to mediate. We find that, increasingly, the courts are finding refusals to mediate unreasonable, even in cases where the party considers it has a very high chance of succeeding at trial and, in fact, does.

Clients involved in litigation may be unhappy at having to incur the additional costs of mediation, particularly in cases considered highly unlikely to settle in the process and where they are advised that they have very high prospects of success at trial. Nevertheless, we think that the costs risks of refusal are now so high that mediation should be the default option in almost every case. If your clients remain unwilling to mediate, they should be given a clear warning of the possible costs consequences, even if they go on to win at trial.

In defending claims against our insureds, we have had many successful outcomes at mediation. In one instance, where the contract for the purchase of a flat included the provision of an architect’s certificate, the solicitors acting for the purchasers failed to obtain the certificate from the developers. The developer went into liquidation, the purchasers moved into the property and, shortly afterwards, discovered a serious defect in the floor. The purchasers, now the claimants, pursued the solicitor for the whole of the purchase price plus expenses and costs. Our early Part 36 Offer was rejected and we agreed to mediate. The claimants told us that they wanted an opportunity to tell us their story themselves face to face. When they did so at the mediation, we could see that they were wholly credible and would make good witnesses at trial. During the course of the mediation, the claimants indicated that they would be satisfied if we paid off their mortgage. They said that they would then take steps to remedy the defect at their own cost. This not only achieved a significant saving, but also the settlement ensured that there could be no similar claim against them from the claimants’ mortgagee for whom they had also acted. There would have been no possibility of achieving this kind of settlement at trial.

We have, over the past few years, also achieved significant reductions on lender claim settlements at mediation. Savings have, in several cases, been over 60% from the sums initially claimed. In one particular case, the lender refused to consider anything less than recovery of the entirety of its losses. The solicitor’s conduct had appeared to the lender to be suspicious and the lender was convinced, in any event, that a judge would find for the lender in respect of breach of fiduciary duty. Negligence was admitted, and we were prepared to settle the claim at a significant discount in the end.

Finally, (if we are allowed to promote our claims team), one of our in-house claims solicitors recently attended a multi-party mediation which concluded successfully. Shortly after the mediation took place, the following e-mail was received from our insured:

“I write further to the mediation last Monday. I am writing to you directly as I wish to say thank you to you and to Zurich for the support and assistance which you have given to our firm. Your input at the mediation was fantastic and I am sure we would not have achieved such a good result if it had not been for the approach which you took…”

Next month, as we reach the end of the policy year for most of you, we will look at this year’s top ten causes of claims against solicitors.
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