THE INHERITANCE ACT IN 2016

Tim Walsh, Guildhall Chambers

1. There have been two major developments in the law concerning the Inheritance (Provision for Family and Dependants) Act 1975 in the last two years.

    i. First, on 1 October 2014 the Inheritance and Trustees' Powers Act 2014 came into force.

    ii. Secondly, on 27 July 2015 the Court of Appeal delivered judgment in the latest (but not the final) round of litigation in *Ilott v. Mitson* [2015] EWCA Civ 797.

The Inheritance and Trustees' Powers Act 2014

Application

2. The 2014 Act enacted a comprehensive package of reforms to intestacy and to the law of family provision under the 1975 Act but there will be a lengthy period of transition because section 6 of the 2014 Act (which implemented the reforms in Schedule 2 of that Act) applies only in relation to deaths occurring after 1 October 2014. Since the 6 month limitation period in the 1975 Act does not start running until there has been a grant of representation there will be many claims to which the statute in its un-amended form will continue to apply.

Overview

3. By way of a broad overview, the 1975 Act is, of course, *the* principal statutory inroad into testamentary freedom. If your client falls into one of the 6 classes of eligible applicant in section 1 of the Act and the will or intestacy fails to make "reasonable financial provision" for that client then a claim may be brought. If it is brought more than 6 months after the grant, however, the court's permission is required.

4. Those applicants were:

    i. the spouse or civil partner of the deceased;
    ii. a former spouse or civil partner who has not remarried or formed a new civil partnership;
    iii. cohabitees who were living with the deceased as husband or wife for two years ending on the death;
    iv. a child of the deceased;
    v. s. 1(1)(d): "any person (not being a child of the deceased) who, in the case of any marriage or civil partnership to which the deceased was at any time a party, was treated as a child of the family in relation to that marriage or civil partnership";
    vi. s. 1(1)(e): "any person...who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased".

5. Save for spouses and civil partners (and one very limited exception relating to an ex-spouse), applicants are confined to:

    "...such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance".

6. The court determines the question of what would be reasonable financial provision by weighing all of the relevant circumstances as enumerated in section 3 of the Act. These obviously include, but are not limited to, the financial needs and resources of all of the applicants and beneficiaries and the size of the net estate; in relation to a spouse, particular regard must also be had to what the spouse would have received had the marriage ended with divorce rather than death.

The 2014 reforms

7. The package of reforms that will be increasing applicable the further we move away from October 2014 are found in Schedule 2 of the 2014 Act. The principal reforms are as follows.

A procedural reform

8. **Section 4** is amended.

9. Previously the section read:

   "4. An application for an order under section 2 of the Act shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out".

10. It now reads:

    "4. An application for an order under section 2 of this Act shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out (but nothing prevents the making of an application before such representation is first taken out)."

11. This seemingly inconsequential change is important because it removes an ambiguity created by two conflicting authorities as to whether a claim could be brought before a grant was made. Now, incontrovertibly, it can.

A limitation reform

12. **Section 9** is amended.

13. There is, or was, a so-called "negligence trap" in section 9 of the Act.

14. In its historic form section 9 read as follows:

    *"9(1)Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if, before the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out, an application is made for an order under section 2 of this Act, the court for the purpose of facilitating the making of financial provision for the applicant under this Act may order that the deceased's severable share of that property, **at the value thereof immediately before his death**, shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Act as part of the net estate of the deceased."*

15. This is a section that can make or break a claim. It effectively allows the court to claw back property passing by survivorship so that it is treated as forming part of the net estate for the purpose of satisfying a claim. Without it, there may be nothing in the estate.

16. However, the trap for the unwary was the requirement that a section 9 application be brought within 6 months of the grant. Many practitioners wrongly fell into the trap of assuming that the discretion to allow a claim to be brought out of time under section 4 meant that there was a similar discretion to extend time under section 9 but there was not.

17. Section 9 now reads:

"9(1) Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if an application is made for an order under section 2 of this Act, the court for the purpose of facilitating the making of financial provision for the applicant under this Act may order that the deceased's severable share of that property. shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Act as part of the net estate of the deceased."

18. By deleting the emphasised words (in paragraph 14 above), the court is now permitted to exercise the section 9 power even where the application has been made (with the court's permission) more than 6 months after the grant.

19. There is still a trap because the amendment is not retrospective. Whenever you have a case in which substantial property may have passed by survivorship do not rely upon section 4 or a standstill agreement if the death occurred prior to October 2014.

20. The second amendment to section 9 is the removal of the words "*at the value thereof immediately before his death"*. The Court of Appeal in *Dingmar v. Dingmar* [2006] EWCA Civ 92 had found that those words were unclear. To remedy that, a new subsection 9(1A) has been inserted:

    "(1A) Where an order is made under subsection (1) the value of the deceased's severable share of the property concerned is taken for the purposes of this Act to be the value that the share would have had at the date of the hearing of the application for an order under section 2 had the share been severed immediately before the deceased's death, unless the court orders that the share is to be valued at a different date."

21. Now, as a general rule, the court will have regard to the value of the property at the date the claim is heard which reflects the default position in the rest of the Act. However, if the jointly owned property has, for example, been sold it may be appropriate for the court to adopt a different valuation date.

Reforms of the eligibility requirements

22. **Section 1** has been amended to slightly widen the class of eligible applicants.

23. Section 1(1)(d) did read that the class of eligible applicants included:

    "(d) any person (not being a child of the deceased) who, in the case of any marriage or civil partnership to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage or civil partnership".

24. Section 1(1)(d) as amended instead provides that applicants include:

    "1(1)(d) any person (not being a child of the deceased) who in relation to any marriage or civil partnership to which the deceased was at any time a party, or otherwise in relation to any family in which the deceased at any time stood in the role of a parent, was treated by the deceased as a child of the family"

25. This, then, extends the category of applicant to any person who was treated as a child of the family, not in relation to only a marriage, but in relation to any other family in which the deceased had a parental role.

26. The reform retains the necessity that the relationship between the deceased and the applicant needs to have been akin to that of a parent and child but it removes the arbitrary unfairness of the requirement that the deceased was married.

27. In addition, a new section 1(2A) has been added:

"1(2A) The reference in subsection (1)(d) above to a family in which the deceased stood in the role of a parent includes a family of which the deceased was the only member (apart from the applicant)."

28. For the first time a single parent family is therefore brought within section 1(1)(d) notwithstanding that the child was not the deceased's.

29. The other reform to eligibility is to widen the class of eligible applicants under section 1(1)(e).

30. That section reads that eligible applicant include:

    1(1)(e) "any person... who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased"

31. Section 1(1)(e) is not amended but that section always had to be read with subsection 1(3) which did read that:

    "1(3) For the purposes of subsection (1)(e) above, a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person."

32. The words "otherwise than for full valuable consideration" had been interpreted as requiring the court to balance the contribution made by the deceased towards the needs of the applicant against any benefits flowing the other way - a so called "balance sheet" assessment of the respective contributions of the deceased and the applicant. If the balance sheet showed that the applicant contributed more to the deceased than vice versa, then the applicant could not be said to have been maintained by the deceased and eligibility under section 1(1)(e) would not be made out.

33. Section 1(3) now provides that:

    "(3) For the purposes of subsection (1)(e) above, a person is to be treated as being maintained by the deceased (either wholly or partly, as the case may be) only if the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature."

34. This removes the words "otherwise than for full valuable consideration" and the intention behind the reform is that contributions made between people in a domestic context should no longer be weighed against one another when determining eligibility. It remains the case, however, that the deceased must have been making a "substantial contribution" towards the needs of the applicant.

Section 3 reforms

35. There are some minor reforms to the orders that can be made under the Act under section 2 but the other key reforms are found in paragraph 5 of Schedule 2 to the 2014 Act and they affect changes to the all important terms of section 3. Namely, they impact on the central question of whether an order for reasonable financial provision should be made at all.

36. As already noted, one of the criteria for consideration in a claim by a spouse is what they would have received had the marriage ended in divorce. This is contained in section 3(2) which read:

    "...In the case of an application by the wife or husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have

expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce."

37. That has been amended thus:

"...In the case of an application by the wife or husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation *was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by* a decree of divorce*; but nothing requires the court to treat such provision as setting an upper or lower limit on the provision which may be made by an order under section 2."*

38. Arguably this is one of the less significant reforms because it seems to reflect the position established in the authorities in any event.

39. Consequent upon the reforms to section 1(1)(d) and (e) regarding eligibility, there are also reforms to the matters that the court must consider in assessing claims by such applicants under section 3 of the Act.

40. The unamended section 3(3) stated:

"3(3) ...where the application is made by virtue of section 1(1)(d) the court shall also have regard—

(a) to whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and the basis upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;

(b) to whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child;

(c) to the liability of any other person to maintain the applicant."

41. That section has been amended:

"3(3) ...where the application is made by virtue of section 1(1)(d) the court shall also have regard—

(a) to whether the deceased maintained the applicant and, if so, to the length of time for which and basis on which the deceased did so, and to the extent of the contribution made by way of maintenance;

(aa) to whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant;

(b) to whether in maintaining or assuming responsibility for maintaining the applicant the deceased did so knowing that the applicant was not his own child;

(c) to the liability of any other person to maintain the applicant."

42. As can be seen, sections 3(3)(a) and (b) have been amended.

43. As amended, paragraph (a) now directs the court to have regard to whether the deceased did in fact maintain the applicant and, if so, to (I) the duration of that maintenance, (II) the basis upon which it was provided and (III) how much maintenance the deceased contributed.

44. Paragraph (aa) has been inserted to preserve something of the effect of the old section 3(3)(a) so that the court (still) also has regard to whether the deceased assumed responsibility for the applicant's maintenance.

45. As a result of the additional requirements of the new section (a), section 3(3)(b) has been amended so that the court considers whether, both in maintaining or assuming responsibility for maintaining the applicant, the deceased did so knowing that the applicant was not his own child. Although one might reasonably ask why the knowledge of the deceased in that regard is relevant at all.

46. The final reform addressed here is to the factors for consideration in claims by dependants under section 1(1)(e) (as amended). Section 3(4) sets out the additional matters to which the court must have regard when assessing their claims. Previously it was in these terms:

    "3(4) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(e) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant and to the length of time for which the deceased discharged that responsibility."

47. Section 3(4) now reads:

    "3(4) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(e) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard—

    (a) to the length of time for which and basis on which the deceased maintained the applicant, and to the extent of the contribution made by way of maintenance;

    (b) to whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant."

48. It will clear that the amendments separate two issues to which the court must give consideration.

49. Under section 3(4)(a), the court must consider the duration of the actual maintenance provided, the basis on which it was provided and the extent of the actual contribution by way of maintenance.

50. Under section 3(4)(b), the previous consideration of the deceased's assumption of responsibility (beyond actual maintenance) is preserved in a new form.

51. As the explanatory notes to the 2014 Act explain, in the case law on the unamended section 3(4), an assumption of responsibility for the applicant's maintenance must be present to make out a claim under section 1(1)(e) but that is now removed by these amendments.

Summary

52. In summary, it follows that the post-2014 landscape will see a shift in the law:

    i. bars to any early claim caused by delay in a grant of probate are removed;

    ii. limitation is less of an issue in relation to property passing by survivorship;

    iii. the class of eligible applicants has been tweaked to expand it slightly; and

iv. the factors at play when quantifying a claim have been modified in relation to 3 of 6 classes of applicant.

Ilott v. Mitson [2015] EWCA Civ 797

53. The facts of *Ilott v. MItson* were that the late Mrs. Jackson died leaving an estate of some £486,000 to a number of charities. The will made no provision for Mrs. Jackson's estranged daughter who was a married mother of 5 living in necessitous circumstances in 3 bed housing association accommodation. She had not worked for 25 years and her prospects of employment were poor. 75% of the family's "extremely modest" income was made up of state benefits.

54. Before turning to the crux of the issue, *Ilott* is a useful case in that two different constitutions of the Court of Appeal have now approved the all important definition of "maintenance" given in *Re Dennis* [1981] 2 All ER 140:

"...The court has, up until now, declined to define the exact meaning of the word 'maintenance' and I am certainly not going to depart from that approach. But in my judgment the word 'maintenance' connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. The provision that is to be made is to meet recurring expenses, being expenses of living of an income nature. This does not mean that the provision need be by way of income payments. The provision can be by way of a lump sum, for example, to buy a house in which the applicant can be housed, thereby relieving him pro tanto of income expenditure..."

55. The other key points to emerge from the 2011 decision of the Court of Appeal were:

i. It was reaffirmed that adult children do not need to establish a moral obligation on the deceased as a prerequisite for a successful claim under the Act.

ii. Nonetheless, if an adult child "*is of working age, with a job or capable of obtaining a job which would be available, the factors in favour of his claim for financial provision may not be of much weight in the scales".*

iii. However, previous suggestions that "necessitous circumstances" cannot in themselves be enough probably misstated the law. Any case simply involves weighing the matters in section 3.

iv. The judge is not exercising a discretion but making a "value judgment" based on his assessment of the factors in section 3(1) of the Act.

56. By way of a re-cap, the tortured history of the claim was as follows:

(I) Following the deceased's death in 2004, the claim was determined by District Judge Million on 7 August 2007. He awarded the Claimant £50,000.

(II) On appeal, on 1 December 2009 Eleanor King J. allowed an appeal and dismissed the claim.

(III) On 31 March 2011 the Court of Appeal allowed an appeal against that decision. Sir Nicholas Wall stressed that "*great weight must be attached to the value judgment reached by the court of first instance, and that any appellate court should think long and hard before coming to a contrary conclusion*". The Court directed that the matter should be remitted to the High Court to hear an appeal by the daughter on quantum

adding: *"Whilst this is an outcome which I would direct, I urge the parties to consider carefully whether a further hearing is in anyone's interests".*

57. At that point, given that the question of whether to make any award and the quantum of that ward engage exactly the same statutory considerations, you might reasonably think that "the value judgment" of the District Judge on quantum was unlikely to be upset on appeal.

    (IV) Nonetheless, everybody fought on. On 3 March 2014 Parker J. gave judgment on the quantum appeal (now some 10 years since Mrs. Jackson died) which was dismissed.

58. And so to round five. On 27 July 2015 the Court of Appeal gave judgment on the quantum appeal. For the award of £50,000 the Court of Appeal substituted an award of £143,000 representing the costs of buying a home plus the reasonable expenses of doing plus an additional capital cushion of £20,000.

59. When this talk was first conceived, the intention had been to make the reasoning of the Court of Appeal very much the centre piece of the talk. I have concentrated instead on the 2014 Act reforms for the simple reason that this month, on 1 March 2016, the Supreme Court granted permission to the charity beneficiaries to appeal. Some 12 years after the death of Melita Jackson the saga continues.

60. To understand where the law might be going, it is necessary to look at what the Court of Appeal did.

61. The court considered that there were two fundamental errors in the District Judge's approach.

    (I) First, the District Judge had concluded that because of the claimant's estrangement from her mother she had a "lack of expectancy" which, coupled with her longstanding ability to live within her means, meant that her award should be "limited". Somewhat harshly, the Court of Appeal stated that it was wrong in law to say that the award should be limited for those reasons without explaining what the award would otherwise have been.

    (II) Secondly, the District Judge did not know what effect the award of £50,000 would have on the claimant's state benefits and so had made a "working assumption" that a large award would disentitle the claimant to most of her statement benefits. Failure to verify that assumption was said to have undermined the logic of the award.

62. Referring to a "discretion" rather than a value judgment, the court determined that it should "re-exercise the discretion". All of the section 3 factors were weighed before Arden LJ then added the following:

    "[58] The first question which I have to decide is whether the current living standard is sufficient. This is the correct test, and the court's assessment should not be motivated by a desire to provide an improved standard of living as opposed to a desire to meet appropriate living needs. Nor on the other hand is the court bound to limit maintenance to mere subsistence level. In my judgment, the Appellant's present income is not reasonable financial provision for her maintenance in the context of this application given the restrictions which... she has to impose on her own expenditure and the lack of any provision to meet her future needs, for example when she grows older or if she suffers any ill-health."

63. Adding:

    "[60] In my judgment, what the court has to do is to balance the claims on the estate fairly. There is no doubt that, if the Claimant for whom reasonable financial provision needs to be made is elderly or disabled and has extra living costs, consideration would have to be given to meeting those. In my judgment, the same applies to the case where a party has extra

financial needs because she relies on state benefits, which must be preserved. Ms Reed submits that the provision of housing would not do this. I disagree. The provision of housing would enable her both to receive a capitalised sum and to keep her tax credits. If those benefits are not preserved then the result is that achieved by DJ Million's order in this case: there is little or no financial provision for maintenance at all."

64. Tellingly, Ryder LJ added:

"[69] I strongly agree that a person's means are not conclusive of the appropriate level at which that person is entitled to be maintained. That is a value judgment to which the court must come. As a matter of public policy, the court is not constrained to treat a person's reasonable financial provision as being limited by their existing state benefits nor is the court's function substituted for by any assessment of benefits undertaken by the state."

Timothy Walsh
Guildhall Chambers
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