Hewitsons Will & Estate Disputes

LEGAL UPDATE

Absolute Client Focus

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The Court grants permission under Section 57(1) of the Trustee Act 1925

In the case of *South Downs Trustees Limited –v- GH*, the High Court has recently considered an application under section 57(1) of the Trustee Act 1925. This section allows a trustee to apply to Court for permission to carry out a sale, disposition or other transaction in connection with a trust which they would otherwise be unable to perform, either because of a law in force, or because of the absence of a power to do so in the trust instrument itself. The purpose of section 57(1) is to allow the Court to authorise specific dealings with trust property to ensure that it is managed in the best way possible and in the interests of the beneficiaries but, crucially, not to rewrite the trust. Section 57 applications are not common, but this case highlights their usefulness.

In this case, the Court was asked to determine whether a trustee could sell the trust's entire interest in a holding company, thereby bringing the trust to an end. The object of the trust was to facilitate the holding of shares by the beneficiaries, or for their benefit. The relevant clauses of the trust instrument gave the trustee the power to apply income and capital of the trust for the benefit of the beneficiaries but restricted his power to dispose of the trust's

beneficial interest in any shares if that resulted in a loss of control of the holding company.

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The Court considered the elements of the section 57(1) test in turn. Firstly, it was clear that the fist condition was satisfied, as the trustee had no express power to carry out the proposed transaction. The Court then had to determine whether it was expedient for the trustee to dispose of the shares. In doing so, the Master weighed the overall financial advantages and disadvantages of the proposed sale and concluded that there were significant benefits from the sale which were far greater than any possible risk or other consideration. Lastly, the Court had to consider the exercise of its discretion in order to confer the additional power on the trustee. This decision was a 'momentous' one given that it would result in the trust being wound up and represented a significant change in approach to the original purpose of the trust. However, the Court's view was that the trustee was right to adopt a different approach in light of what was expected to be a less beneficial financial era on the horizon. The trustee's decision to sell the shareholdings was not an unreasonable one and there were no conflicts of interest to be concerned with.

This case should be of interest to trustees faced with decisions which would go beyond the scope of their powers under the trust instrument. Section 57 applications might be considered as an alternative to Variation of Trusts Act applications in the appropriate circumstances.

False promises can be sufficient to establish undue influence

It is widely acknowledged that the burden of establishing testamentary undue influence is one which is hard to overcome. However, a recent case in the Alberta Court of Queen's Bench has offered some useful insight into the type of evidence which the Court may take into account when considering whether a Will is the true expression of the testator's wishes, or a product of another person's wishes.

In brief, the case of *Kozak Estate (Re)* involved an elderly testator, Ted, who, at the age of 72, had been a bachelor all his life and still lived on the farm where he was born. In 2011, Ted met Maryann Seefoot, a 56 year old woman, with adult children from prior relationships. Within two months of meeting Maryann, Ted Kozak sold his childhood home and moved in with her in a town closer to her social circle. Maryann promised to marry Ted, however the Judge noted there was little evidence of any loving relationship.

Ted had made an earlier Will in 2009 leaving his estate to his sister. However, in 2011 and 2012 he made two subsequent Wills naming Maryann as his sole beneficiary. The second Will was expressed to be in contemplation of his marriage to Maryann, although this union never took place. In 2013, Ted's health deteriorated and he was admitted to residential care. Over the next year or so, Maryann drained his bank accounts and yet failed to visit him or to provide him with any care or support. Ted died in 2014 and his sister, Yvonne, challenged the validity of the last two Wills on the ground of undue influence.

The Court upheld Yvonne's claim and declared that Ted's last two Wills were "not Ted's will but Maryann's, her desire to acquire his assets and spend his money", the result of Maryann's influence over him. Although much of the evidence in this case was circumstantial, the Court held that there were clear indications that Ted had been manipulated by Maryann's false promises of marriage and

companionship. In particular, the Court pointed to some key circumstances which were relevant in establishing undue influence in this case. These were the increasing isolation of Ted and his resulting dependence on Maryann, the substantial pre-death transfer of wealth to Maryann alongside Ted's apparently unfounded concerns that he was running out of money, Ted's inability to explain why he was leaving his entire estate to Maryann to the exclusion of his own family and, finally, documented statements that Ted was afraid of Maryann.

This case is of interest since, although from a different jurisdiction, it suggests we might see a developing line of case law on undue influence. Whereas we would usually advise it is necessary to prove fraud or coercion on the part of the influencer over the testator in order to establish undue influence, it seems that controlling or manipulating a testator's judgment through false promises may also be sufficient. It also shows that circumstantial evidence can play a crucial role in establishing an undue influence claim.

Reform of the Deprivation of Liberty Safeguards - Bill Update

In July 2018 the Government published the Mental Capacity (Amendment) Bill, which will reform the existing Deprivation of Liberty Safeguards (DoLS). The new scheme will be known as the Liberty Protection Safeguards (LPS).

Earlier this October, the Bill reached the Committee stage, where the Government confirmed that the LPS will cover situations where deprivation of liberty is justified on the basis of risk of harm to others. There have been no amendments made to the proposed Bill, however the government announced an intention to bring forward amendments to:

1. Extend the scope of the Bill from 18, to include 16 and 17 year olds;
2. Confirm the need to consult the cared-for person, to understand what the person's wishes and feeling are about the arrangements;
3. Introduce a statutory definition of Deprivation of Liberty, which replaces the acid test set out in the Cheshire West and Surrey Supreme Court judgement;
4. Replace the term "unsound mind".

In addition, care home managers will be excluded from undertaking pre-authorisation reviews. Further, cases involving acquired brain injury, harm to others and those in receipt of mental health treatment in a private hospital, will be referred to an Approved Mental Capacity Professional (AMCP). The Bill will also broaden the scope to treat people, in a medical emergency, without prior consent.

It remains unclear when the Bill will become law and subsequently implemented. The Hewitsons team will continue to post relevant updates as the Bill progresses.

Cohabitee 1975 Act Claims: Life interest or Lump sum payment?

The case heard earlier this year of *Banfield v Campbell*, involved a cohabitee claim under the Inheritance (Provision for Family & Dependants Act) 1975 ("the 1975 Act"), for reasonable financial provision following the death of a partner. As is often the case where relations between the parties have broken down, the dispute centred on what sum of money should be awarded to the surviving cohabitee from the Estate, in order for the surviving partner to be suitably rehoused and a clean break achieved between the parties.

Sarah Campbell died in October 2015. Sarah had a son, James and inherited the family home in Thames Ditton, on her husband's death in 1992. In 1993 she began a relationship with Mr Banfield. Originally he lived with his mother but eventually moved in with Sarah from 2001. Mr Banfield was still living with Sarah when she died 14 years later.

Sarah's estate was worth in the region of £753,000; the bulk of which consisted of the property. Under her last Will made in 2001, she left a gift of £5,000 to Mr Banfield, described as her "friend" and the remainder of her estate to James. Mr Banfield was 63 by the date of Sarah's death and partly disabled. The home they shared to be inherited by James was likely to be sold, leaving Mr Banfield homeless. He duly made a claim for reasonable provision from Sarah's estate under the 1975 Act.

Mr Banfield had a net annual income of £30,000. He had also inherited from his late mother and had investments of £277,000. Mr Banfield claimed a housing need for a ground floor maisonette with garden in Thames Ditton, in the region of £450,000; effectively more than 50% of Sarah's estate. James claimed that this was excessive and that only £220,000 was needed to buy a 1 bedroom apartment.

Master Teverson, followed Lord Hughes' judgment in the widely publicised Supreme Court decision last year of *Ilott v Mitson*, rejected both arguments. There were two special circumstances of the present case. Firstly, Sarah had inherited the property from her late husband and secondly, Mr Banfield's housing needs required sums equating to more than 50% of the estate. Master Teverson said that the purpose of the 1975 Act is to provide maintenance, not to confer capital on the Claimant. He therefore ordered that the property be sold and half of its net sale proceeds held on a life interest trust for Mr Banfield, to be used to provide alternative accommodation, the capital of which would then pass to James on Mr Banfield's death. In addition he ordered that £20,000 be kept available in the Estate should Mr Banfield require any adaptations to the subsequent property purchased for him.

This case highlights that the Courts are more likely to consider a life interest trust, where there are children from a previous relationship to whom the Deceased wished to pass capital, despite the parties preferring a clean break arrangement. Master Teverson held that "*[t]he fact that relations between the parties have broken down as a result of this litigation does not persuade me that it is right to make provision in the form of a lump sum*".

The Hewitsons team have a wealth of experience both bringing and defending 1975 Act claims. Please contact a member of the team for advice.

Case Citation: *Banfield v Campbell [2018] EWHC 1943 (Ch)*

Sole beneficiary loses appeal against claim for financial provision by adult children

Mr Lomax executed a Will in 1997 leaving his whole estate to Ms Greenslade, also named as the executor in his Will. On his death, his three children claimed under the Inheritance (Provision for Family and Dependants) Act 1975 ("1975 Act"), that his Will failed to make reasonable financial provision for them.

At first instance, Ms Greenslade failed to attend court; she had applied for an adjournment of trial but this was refused. The judge found that Mr Lomax's estate was worth £699,000 and therefore concluded that the sum of £69,000 only should be given to Ms Greenslade, with the rest of the estate to be divided equally between Mr Lomax's children.

Ms Greenslade appealed the decision and argued that in awarding the same amount to all three children, the judge had failed to consider each child's financial circumstance. Further, she sought to set aside judgement on the basis that the trial should not have taken place.

The High Court refused to set aside the judge's decision at first instance because Ms Greenslade had failed to satisfy the criteria set out in Civil Procedure Rule 39.3. The court held the following:

a. Applications to set aside judgement must be made promptly. Ms Greenslade received the transcript of the judgement in early March 2018 and yet failed to make the application at that time.

b. Ms Greenslade had a good reason for not attending trial; she had provided medical evidence of her mental illness. However, she had failed on the first criteria referred to above.
c. Whether Ms Greenslade would have a reasonable prospect of success at trial was answered by the fact that the High Court found that the judge correctly considered each child's financial circumstances and rightly concluded for an equal distribution.

Further, bearing in mind the size of the estate, it was not sensible for the case to be reheard at county court. The court accepted a new probate valuation which evidenced that the total estate had reduced to £636,000 but nevertheless concluded that the same award be made to Ms Greenslade. Therefore, Ms Greenslade is to receive £69,000 of Mr Lomax's estate of £636,000, with the rest of his estate being shared equally amongst his three children.

This case highlights the importance of the 1975 Act, where the Deceased fails to make reasonable financial provision for a family member. Further, the High Court judgment represents a harsh reminder that an application to set aside judgment must be made promptly.

Case Citation: *Lomax* v *Greenslade* [2018] EWHC 2623 Ch

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For advice on any of the issues discussed in the above cases, please feel free to contact a member of the team for more information.