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Prepared by Kysen PR

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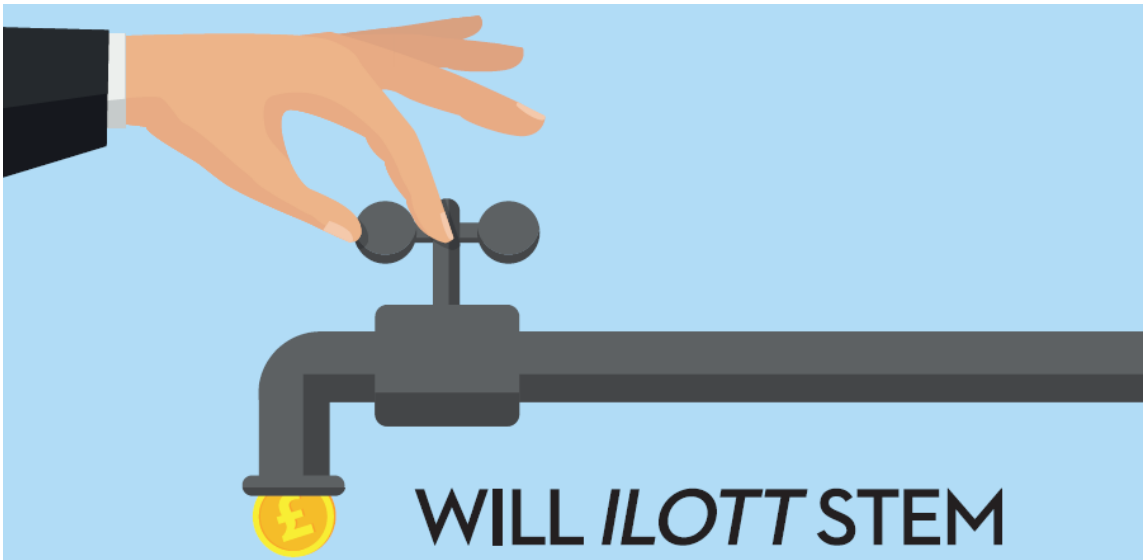

WILL *ILOTT* STEM THE TIDE?

Practical guidance on mitigating the risk of would-be beneficiaries interfering with a client's charitable testamentary wishes. By Constance McDonnell

KEY POINTS

WHAT IS THE ISSUE?
In the future, charities are likely to be involved in an increasing number of disputes relating to the validity of wills or claims under the *Inheritance (Provision for Family and Dependants) Act 1975*.

WHAT DOES IT MEAN FOR ME?
Charities rely heavily on testamentary donations and, subject to issues of proportionality, will probably be prepared to scrutinise in detail any claims that may have an impact on such donations.

WHAT CAN I TAKE AWAY?
The preparation of a will that includes a charitable gift must be carried out with particular care to record the reasons for the gift and the testator's connection with the charity.

In 2016, the UK population donated almost GBP10 billion to charity, of which around GBP2.8 billion was donated by testators who included charities as beneficiaries of their wills. Many of the leading charities in the UK depend heavily on testamentary gifts for their income, and the financial status of smaller charities may be dramatically altered by even one significant donation. Such testamentary gifts to charity were in the spotlight in 2017, due to the high-profile appeal of three national charities in the Supreme Court in *Ilott v The Blue Cross*.[1] That case, and other disputes between charities and family members relating to inheritance or family provision, inevitably highlighted the tension between testamentary freedom and the belief, held by many, that charity should begin at home. Many of the charities that depend most on testamentary gifts for their income are far better able to afford expensive litigation than the average person, and the stakes in such disputes tend, therefore, to be very high.

The UK government strongly supports charitable giving in wills. In December 2017, at the same time as the Law Commission of England and Wales was reviewing the will-making process, with a view to enable more people to make wills (in part, because the intestacy rules do not provide for charities to benefit), the Minister for Sport and Civil Society wrote to 8,000 solicitors, urging them to promote charitable legacies when taking testamentary instructions.

A Cabinet Office Behavioural Insights Team trial, conducted a few years ago, revealed that the number of testators who would be minded to make a testamentary gift to charity doubled if the solicitor or will-writer simply mentioned that making such a gift was an option, and increased by a further 50 per cent if the testator were asked whether there were any charities they were passionate about. Therefore, if the Minister's encouragement is heeded by solicitors, such discussions when taking testamentary instructions are likely to create a further increase in charitable donations by will, which are already on the rise: according to research from Co-op Legal Services, one in ten testators made charitable donations by their will in 2017 (compared to one in 16 in 2016).

PUBLIC POLICY

The number of claims issued in the Chancery Division of the High Court under the *Inheritance (Provision for Family and Dependants) Act 1975* (the 1975 Act) rose sharply in 2016: 158 claims were issued, 116 more than in 2015 (not including the large number of such claims issued in the Family Division and in county courts). Coupled with the likely future increase in testamentary

charitable gifts, charities will increasingly often be the defendants in such claims.

Public policy in relation to testamentary charitable donations was a key issue in the arguments before the Supreme Court in *Ilott*, in which three leading charities sought to reduce the relief that the testatrix's daughter would receive in her claim under the 1975 Act. There was some consensual discussion in argument at the hearing in December 2016 that some smaller charities connected with or reliant on a particular testator may be able to show 'need' or 'obligation' for the purposes of s3(1)(c) and (d) of the 1975 Act, but that, otherwise, most charities would not be able to, despite the fact that many of them depend heavily on income from testamentary donations.

Although that case represented the perfect opportunity for the Supreme Court to determine that the public policy of supporting charitable giving should influence judges in such claims, it steered clear of making any such explicit statement. The closest it came was the following passage in the judgment of Lord Hughes (with whom the other six Supreme Court justices agreed):

> 'The claim of the charities was not on a par with that of Mrs Ilott. True, it was not based on personal need, but charities depend heavily on testamentary bequests for their work, which is by definition of public benefit and in many cases will be for demonstrably humanitarian purposes. More fundamentally, these charities were the chosen beneficiaries of the deceased.'

It is possible that charities may seek to rely on this passage in future cases as suggesting that they should be regarded by the court as having 'needs', even though such needs are not personal; and/or that the purpose of the charity may be a relevant factor if it is 'demonstrably humanitarian' or can be linked to the testator's circumstances.

Historically, courts have consistently treated charitable defendants as not having 'need' for the purposes of the 1975 Act. It would be surprising if the Supreme Court had intended to sweep away a decades-long judicial approach in this very brief passage of the judgment, rather than by a more explicit statement. It remains to be seen how the courts will weigh up a charitable defendant's reliance on testamentary donations with the financial needs of a claimant in future cases. One can imagine a particularly delicate balancing act in a case where the purpose of a defendant charity relates to, for example, a health problem of the claimant or a philanthropic passion of the testator.

The Supreme Court was informed that the Court of Appeal's decision in *Ilott* was appealed by the three charitable beneficiaries of Mrs Jackson's will largely as a matter of principle, because of the possible impact of the decision to award about one-third of the GBP486,000 estate to the claimant – in other words, in order to discourage future ambitious claims by adult children.

REPUTATIONAL DAMAGE

There is no doubt that many charities have deep pockets with which to fund the defence of claims relating to wills, although they obviously need to make proper decisions at each stage of any such dispute or litigation as to whether it should continue or be settled. They will also be mindful of the adverse publicity that may attach to their involvement in such cases, not least because of the very substantial legal costs that may be incurred – such as in the lengthy litigation in *Gill* v *Woodall*.[2]

Indeed, in many cases where charities compete with family members for legacies in a probate or 1975 Act claim, there is the possibility that the media will paint the charities in an unflattering light. The recent press[3] about the dispute in relation to the validity of the last will of Tracey Leaning, which left her estate to her partner Richard Guest in place of the four charitable beneficiaries of her previous will, is one such example. Most such claims are obviously far more likely to be settled than fought out in the expensive public arena of the court.

In disputes about the validity of a will, or in defending a claim under the 1975 Act, charities will almost always be in the position of being limited to testing the claimant's case (unless the case involves a small charity associated with the testator that may have some more direct knowledge of the relevant factual circumstances). This does not mean that charities are necessarily hamstrung in such cases. In *King* v *The Chiltern Dog Rescue*,[4] the charitable appellants successfully argued that an alleged *donatio mortis causa* had not taken place, and, in *Royal National Institute for Deaf People and Others* v *Turner*,[5] four leading charities were successful in setting aside a will that had not been properly executed in accordance with s9 of the *Wills Act 1837*. Further, in a 1975 Act claim such as *Ilott*, charitable defendants are likely to scrutinise a claimant's evidence with a degree of objective scepticism, although always with an eye to proportionality.

PRACTICAL CONSIDERATIONS

Many solicitors will no doubt react to *Ilott* by ensuring that any client who wishes to leave a significant amount to charity records the reasons why, so as to discourage any attempt to interfere with the client's will by other or would-be beneficiaries, either by way of a probate claim or a 1975 Act claim. However, it remains to be seen whether *Ilott* really will stem the tide of maintenance-based 1975 Act claims, particularly those by adult children, or whether the publicity that case attracted will, in fact, create an increase in such claims. Either way, it seems likely that charities will find themselves having to make decisions as prospective defendants in more of these claims in the future.

1 [2017] UKSC 17 **2** [2010] EWCA Civ 1430 **3** 'Animal Charities Dispute £340,000 Estate with Grieving Dog Owner', *Lawyer Monthly* (29 August 2017), bit.ly/2DFVWBT **4** [2015] EWCA Civ 581 **5** [2015] EWHC 3301 (Ch)

CONSTANCE McDONNELL TEP IS A BARRISTER AT SERLE COURT CHAMBERS