The Law Society

probate e-alert

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Cases

Revenue and Customs Commissioners v Bower and other (executors of Bower (deceased))

Citation: [2009] All ER (D) 68 (Jan)
Hearing Date: 5 November 2008
Court: Chancery Division
Judge: Lewison J

Representation: David Ewart QC (instructed by the Treasury Solicitor) for the Revenue.Rex Bretten QC (instructed by Damian Ciappelli) for the settlor's executors.
Abstract: Inheritance tax – Valuation. Chancery Division: The appeal by the settlor's executors against a decision of the Special Commissioner that the right to monthly payment under the terms of an estate planning bond set up by the settlor before her death was worth £4,200 was allowed on the ground that in arriving at that figure the Special Commissioner had committed errors of law.

Keywords: Inheritance tax - Valuation - Value of settled property – Reserved rights to life annuity – Settlor paying premium for life annuity policy - Policy issued to trustees of settlement – Settlor subsequently dying - Premium chargeable to inheritance tax – Value of gift – Correct value attributable to reserved rights – Inheritance Tax Act 1984, section 160. Section 160 of the Inheritance Tax Act 1984 provides: 'Except as otherwise provided by this Act, the value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold in the open market at that time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time'.

The settlor, aged 90 and in poor health, bought an estate planning bond from Axa in 2002. She paid £73,000 for the bond, which she transferred to trustees on the terms of a trust. Under its terms, she was entitled to monthly payments of just over £300 in her lifetime. Although the transfer was potentially an exempt transfer for the purposes of inheritance tax, she died very shortly after taking out the bond. The question arose as to the value of the transfer that she made, which was to be calculated by taking the price paid for the bond and subtracting from it the value of the right to a monthly payment.

For inheritance tax purposes, the value of property for inheritance tax purposes was governed by section 160 of the 1984 Act. The Revenue and Customs Commissioners (the Revenue) took the view that in the real world there would not have been a buyer for the right to the monthly payment given the settlor's age and state of health, and accordingly, a purely nominal figure should be attributed to the value of the rights in order to give effect to the statutory hypothesis that the sale must be assumed. Accordingly, it fixed on a figure of £250. The settlor's executors disputed that figure, and the matter came before the Special Commissioner for determination. The Special Commissioner accepted that in the real world the buyer of an interest like the settlor's right to a monthly income for her lifetime would either wish to lay off the mortality risk by buying back-to-back term insurance or would wish to minimise the mortality risk by pooling a number of such interests where the risks of each would have a self-cancelling effect. The Special Commissioner concluded that no buyer would be able to lay off the mortality risk by taking out term life insurance. So far as pooling was concerned, he decided that the possibility of pooling risks by buying more than one annuity was precluded by the statutory hypothesis which required a sale of the settlor's rights alone.

Accordingly, the Special Commissioner found that the combination of the real world and the statutory hypothesis was that those who bought interests of that type in the real world would not have bought that particular interest. The Special Commissioner went on to consider whether the sale in the open market contemplated that a sale should take place in 'some sort of conventional market manner', and decided that no such connotation was involved, and that he was entitled to consider other possible purchasers. In his decision, the Special Commissioner came to the conclusion that the right to the monthly payment was worth £4,200. The Revenue appealed.

The appeal would be allowed.

The property should be assumed to have been capable of sale in 'the open market'. The property should be assumed to have been capable of sale in the open market, even if in fact it had been inherently unassignable or held subject to restrictions on sale. The question was what a purchaser in the open market would have paid to enjoy whatever rights attached to the property at the relevant date.

In asking whether the sale in the open market contemplated that a sale should take place in 'some sort of conventional market manner', it was not at all clear that the Special Commissioner had appreciated that the hypothetical sale took place in the real world. He had not been wrong in saying that he had been entitled to consider other possible purchasers.

There had to be an assumed buyer in order to give effect to the statutory hypothesis that the sale took place. However, although the Special Commissioner had been entitled to consider possible purchasers, he had not been entitled to invent them. The assumption of a buyer, in order to give effect to the statutory hypothesis, in addition said nothing about the price which the buyer was assumed to have paid. If in the real world an asset was worthless, the statutory hypothesis did not make it valuable. It was not lip service to the hypothesis in those circumstances to ascribe a nominal value to an asset. On the contrary, it was the necessary consequence of a finding of fact that an asset was not commercially, as opposed to legally, saleable coupled with the assumption that a sale should be assumed to have taken place. It followed that at that point in his decision the Special Commissioner had gone wrong in law.

The Special Commissioner then went on to consider the price at which the hypothetical willing speculator would have bought the interest. The Special Commissioner had described his figure as being 'little more than uninformed, but hopefully realistic, guesswork', thereby acknowledging that there had been no evidence before him about how a price payable by a speculator might be calculated. Nevertheless, he went on to produce what he described as

'my calculation and valuation'. The Special Commissioner's method of calculation and valuation was not one that had been put forward by anyone and not put by him to any of the witnesses or parties for comment. That in itself was a breach of the rules of natural justice. More importantly, it had not been based on the evidence before him. It had flowed from his erroneous conclusion that he had been required or entitled to populate the real market, in which the hypothetical sale took place, with hypothetical speculators who had not shared the characteristics of real buyers.

The Special Commissioner's decision had been erroneous in point of law.

IRC v Gray (Executor of Lady Fox) [1994] STC 360 applied; Walton v IRC [1996] STC 68 considered.

Sammut and others v Manzi Jnr and others

Citation: [2008] All ER (D) 79 (Dec)
Alternative Citations: [2008] UKPC 58
Hearing Date: 4 December 2008
Court: Privy Council
Judge: Lord Phillips of Worth Matravers, Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Carswell

Abstract: Will – Construction. The Privy Council gave guidance on the approach to interpreting wills and the expression 'per stirpes'.

Keywords: Will – Construction – Approach – Definition of 'per stirpes' – Format of will – Will providing for equal share of 25% between cousins and ex-wife – Whether share between each cousin individually and wife or 12.5% for cousins as a group and 12.5% for wife – Bahamian courts finding wife entitled to 12.5% – Whether courts in error – Definition of 'per stirpes'.

Summary: The testator died in the Bahamas in February 2004, aged 73. His executors estimated the value of his estate at $US30m. The proceedings concerned a will made in June 2003, which was admitted to probate in July 2004. Clause 6 of the will provided: 'I hereby give demise and bequeath all of my real and personal property [...]. to the following persons in the following shares: (i) The first share representing Fifty percent (50%) of my estate to my son, Robert Adams [...] (ii) The second share representing Twenty-Five percent (25%) of my estate to: a. my cousins [...]; and b. my ex-spouse Ruby Adams [...] in equal shares as to the realty in fee simple and as to the personalty absolutely. If any of [the cousins and/or the wife] shall predecease me or shall fail to survive me for a period of Fourteen (14) days, the share to which that individual is entitled shall be paid, transferred or applied to the living heirs of the deceased individual (and, if there shall be more than one such living heir, then among all of such living heirs in equal shares, per stirpes) If the deceased individual shall leave no issue surviving him or her, the share of that deceased individual shall be paid [...] to the surviving beneficiaries named in this sub-clause 6(ii) in equal shares and, if there shall be more than one such surviving beneficiary, then among all such surviving beneficiaries in equal shares per stirpes [...]'. The appellants, referred to in the proceedings as 'the cousins', were the four beneficiaries named in clause 6(ii)(a), namely the testator's first cousins.

The first and second respondents were the executors. The third respondent was R, the testator's only child. The fourth respondent was the testator's ex-wife, who was R's mother. The issue of construction on appeal concerned the manner in which the second share of 25% of the testator's estate, as provided in clause 6(ii), fell to be apportioned in equal shares between all five beneficiaries, so that each took 5%, or whether it fell to be apportioned into two equal portions, one to be shared by the four cousins and the other by the wife, so that each cousin would have 3.125% and the wife 12.5%. At first instance, the judge remarked that the will appeared to have been prepared by means of a modern word-processor computer program and commented that he considered it important to note how the will had been formatted. He went on to find in favour of the wife and hold that she was entitled to 12.5% of the estate. The Court of Appeal upheld that decision and the cousins appealed. The issues included the proper approach to interpreting the will and the meaning of the phrase 'per stirpes'.

The appeal would be allowed.

(1) The starting point when construing any will was to attempt to deduce the intention of the testator by giving the words of the will the meaning that they naturally bore, having regard to the contents of the will as a whole. Sometimes it was legitimate to have special regard to extrinsic evidence in order to show that the words used had a special meaning to the testator, or to resolve uncertainty or ambiguity. Little assistance in construing a will was likely to be gained by consideration of how other judges had interpreted similar wording in other cases. The starting point had to be to look at the natural meaning of the wording of the will to be construed without reference to other decisions or to prima facie principles of construction (see [4] - [6] of the judgment).

It would not be safe in the instant case to attach significance to the formatting achieved by a word processor that might well have been operated by a secretary. More pertinently there was no significance from the precise lay-out of the words used, nor from the use of a semi-colon in the last line of clause 6(ii)(a). The first impression made by the wording of clause 6(ii) was that each of the five persons was to receive an equal share. That was supported by the form of clause 6 taken as a whole; had the testator wished the wife to take a share so much greater than each of the four cousins, the obvious way of achieving that would have been to have bequeathed her share by a separate sub-clause. If clause 6(ii) was construed so that each of the five named beneficiaries received an equal 5% share, consistency was achieved throughout the whole of that sub-clause (see [8], [11] - [21] of the judgment).

Houston v Burns [1918-19] All ER Rep 817 distinguished; Hall, Re, Parker v Knight [1948] Ch 437 considered.

(2) The Latin word 'stirpes' could be translated as meaning 'stock'. But that was not an expression likely to occur to a modern testator when telling his lawyer how he wished his estate to be distributed; it was more helpful to use the alternative meaning of 'family'. In modern usage the phrase as a whole could be taken to mean 'by family'. A gift 'per stirpes' did not require the bequest to be distributed among all the living members of each family, so that children shared in it as well as their parent if he or she was still alive. A characteristic of distribution per stirpes was that remote descendants did not take in competition with a living immediate ancestor of their own who took under the gift. Correctly used, the phrase enabled a gift to a person who predeceased the testator to be distributed among the person's descendants, if any, so that it was kept within that person's family. Where the gift was to a number of persons all of whom were named, the addition of the words 'per stirpes' said nothing about how the gift was to be divided between those individuals if they all survived. The general rule was that the gift would be divided between them equally. The addition of the words 'per stirpes' might be taken to indicate that there was to be a gift over to their heirs or their issue if one or more of them predeceased the testator. But that would usually be done by adding an express direction to that effect (see [25] - [29] of the judgment).

No significance in the instant case would be attached to the fact that the words 'per stirpes' were not added after the words 'in equal shares'. The phrase was correctly used elsewhere in clause 6(ii), where it qualified a gift over to heirs or to issue. It made it clear that the gift over was to each family equally, the issue of each parent who predeceased taking over the share which the parent would have taken had he survived (see [30] of the judgment).

Gibson v Fisher LR 5 Eq 51 considered; Kingsbury v Walter [1900-3] All ER Rep Ext 1531 considered.

Frear v Frear and another

Citation: [2008] All ER (D) 24 (Dec)
Alternative Citations: [2008] EWCA Civ 1320
Hearing Date: 2 December 2008
Court: Court of Appeal, Civil Division
Judge: Sir Andrew Morritt C, Hooper and Wilson LJJ

Representation: Timothy Hirst (instructed by Atkinson and Firth) for the claimant. Jonathan Walker-Kane (instructed by Turners) for the defendants.

Abstract: Equity – Election. The Court of Appeal, Civil Division, dismissed the appeal of the claimant against the dismissal of his claim against the two personal representatives of the estate of his deceased mother on the ground that the claimant was directed by equity to elect between, on the one hand, keeping both his existing quarters of the his beneficial interest in a property but renouncing his right to a further quarter under the will and, on the other hand, ceding to the siblings one of his two existing quarters but asserting his right to one quarter under the will.

Keywords: Equity – Election – Application of doctrine of election to will – Claimant claiming entitlement to three-quarters of beneficial interest of property – Whether claimant holding half beneficial interest in property at date of mother's death – Whether mother believing herself to hold entire beneficial ownership - Whether claimant to be put to election.

Summary: The claimant's mother died on 19 December 2005. By her last will, made on 7 March 2005 and duly admitted to probate, she made specific legacies in relation to all her chattels and devised and bequeathed her residuary estate as to 50% to the claimant and as to the other 50% to her other four children, including her two executors, in equal shares. The only asset falling into the mother's residuary estate was an unencumbered freehold interest in a property which had become vested in her sole name. The claimant brought proceedings against the two personal representatives of the mother's estate. The issue arose as to whether she had held the entire beneficial interest in the property or only one half or it.

Before the judge, the claimant contended, inter alia, that at the date of her death, his mother had held the legal interest in the property on trust as to one half for himself and as to the other half for herself, with the result that one half of the beneficial interest in it fell into her estate and that, in the light of the provision by her will that he should receive one half of her estate, he became entitled, in all, to three quarters of the beneficial interest in the property. The judge rejected the claimant's arguments. He held that, at the date of the mother's death, the claimant did not hold one half of the beneficial interest in the property, but had had only a right that one half of it would be bequeathed to him. The claimant appealed.

He submitted that (i) the judge had been wrong to hold that he had no more than a right that the survivor of his parents would bequeath to him one half of the beneficial interest in the property; (ii) instead, the judge should have held that, following its purchase in 1982, the parents, and thus the survivor of them, held the legal interest in the property in trust as to one half for the claimant and as to the other half for themselves; (iii) it followed that it had been open to the mother, by her will, to dispose only of one half of the beneficial interest in the property; (iv) contrary to the conclusion of the judge, the mother had not purported, by her will, to dispose of more than one half of the beneficial interest in the property; and (v) in disposing of her one half of the beneficial interest in the property, the mother had chosen to bequeath one half of it to him; (vi) thus he was entitled to three quarters of the beneficial interest.

The defendants submitted that the equitable doctrine would require the claimant to be put to an election, albeit the doctrine of election had not been raised before the judge, in that the mother, unaware that the claimant already held one half of the beneficial interest in the property, had intended, by her will, that he should receive one half, and not three quarters, of the beneficial interest in the property, equity would put the claimant to an election as to whether to keep his existing beneficial interest and to renounce his bequest or to accept his bequest and to compensate the estate by ceding to it his existing beneficial interest or its notional value. As to the doctrine of election, it was common ground that it would not apply unless, when the mother had made her will, she considered that she owned the entire beneficial interest in the property and had thus purported thereby to dispose not only of her half interest, but also of the claimant's interest in it.

The defendants applied for fresh evidence to be admitted as to the mother's intention. That evidence consisted of an attendance note of the solicitor who had drawn the mother's will, dated eight days prior to the execution of the will (see [35] of the judgment). The claimant submitted that the doctrine of election did not require him to be put to election because the mother had not purported by her will to dispose of the claimant's one half of the beneficial interest in the property or, alternatively, her purported bequest of his interest was to himself, rather than to another person and so fell outside the ambit of the doctrine.

The appeal would be dismissed.

(1) On the evidence, the judge had erred in finding that, at the date of the mother's death, the claimant had not held one half of the beneficial interest in the property but had only a right that one half of it would be bequeathed to him. His finding was against the weight of the evidence. In all the circumstances, there was no evidence to justify a conclusion that the claimant had foregone the beneficial interest in the property which would ordinarily have arisen in his favour. Accordingly, consideration had to be given as to whether the claimant should be put to election (see [27]-[31] of the judgment).

(2) In the instant case, inherent in the judge's conclusion that the mother had been obliged to bequeath to the claimant one half of the beneficial interest in the property and that, by her will, she had discharged that obligation, was a finding that the mother had considered, by her will, that she was disposing of the whole of the beneficial interest in the property. The fresh evidence confirmed that beyond doubt. Moreover, the mother's disposition of the claimant's half of the beneficial interest had taken the form of her purported placement of it into her residuary estate, which she had directed should be held as to one half for him and to the other half for the siblings. Therefore, in relation to one half of the claimant's existing beneficial interest in the property (equal to one quarter of the whole of the beneficial interest in it), the mother's purported disposition was to the siblings. Equity thereupon directed the claimant to elect between, on the one hand, keeping both his existing quarters of the beneficial interest but renouncing his right to a further quarter under the will and, on the other hand, ceding to the siblings one of his two existing quarters but asserting his right to one quarter under the will (see [34]-[35] and [39]-[41] of the judgment).

Accordingly, albeit by a different process of reasoning to that adopted by the judge, the claimant's appeal would be dismissed, with the precise terms of the order reflecting the nature of the claimant's election (see [42] of the judgment).

Grissell v Swinhoe LR 7 Eq 291 considered; Brown v Gregson [1920] All ER Rep 730 considered.

Raymond Saul & Co (a firm) v Holden (as personal representative of Hemming (deceased)) and another

Citation: [2008] All ER (D) 176 (Nov)
Alternative Citations: [2008] EWHC 2731 (Ch)
Hearing Date: 12 November 2008
Court: Chancery Division
Judge: Richard Snowden sitting as a deputy judge of the High Court
Representation: Peter John (instructed by Raymond Saul & Co) for the claimant. Robert Denman, solicitor advocate of Holden & Co, for the first defendant. Constance Mahoney (instructed by Moon Beever) for the second defendant.

Abstract: Bankruptcy – Property available for distribution. Chancery Division: Having regard to sections 306 and 436 of the Insolvency Act 1986, the bankrupt's trustee in bankruptcy became entitled, and remained entitled, to receive, following his discharge from bankruptcy, assets representing the residuary estate left to the bankrupt in a will, in priority to the executor of the bankrupt's estate, following his death.

Keywords: Bankruptcy – Property available for distribution – Discharged bankrupt – Bankrupt sole residuary legatee under will – Whether assets ascertained forming net residuary estate payable to bankrupt or to trustee in bankruptcy – Insolvency Act 1986, sections 306, 436.

Summary: Section 306(1) of the Insolvency Act provided: 'The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.'

Section 436 of the Insolvency Act 1986, so far as material, provided: '"property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property'.

BH died in July 2003. Under her will, after a few minor specific bequests, she left the entire residue of her estate to her son, H, who was also named as one of her executors. At the time of her death, BH and H owned a farmhouse and a cottage as tenants in common in equal shares. In September 2003, H was adjudicated bankrupt. The second defendant (the trustee) was appointed as H's trustee in bankruptcy with effect from 14 October 2003. H took a grant of probate as the sole executor of BH's will in February 2005. Following the amendment of section 279 of the Insolvency Act 1986 by section 256 and schedule 19 of the Enterprise Act 2002, H was automatically discharged from bankruptcy in April 2005. The cottage was sold for £125,000 in May 2005. Half of the net proceeds, representing H's personal interest in the cottage, were paid to the trustee. The balance, representing BH's interest, was retained by the claimant, a solicitors firm, which at the time was acting for H in his capacity as his BH's executor. The trustee wrote to the claimant requesting that it release the further sum of £28,969.69 from the moneys which it held in order to satisfy the balance then due in H's bankruptcy. The claimant refused that request arguing that although H had been the residuary legatee of BH's estate at the date of his bankruptcy, that status gave him no legal or equitable interest in any of the assets in her estate and would not do so until the administration of the estate had been completed.

The claimant contended that the only right which a residuary legatee had was a right to have the deceased's estate properly administered. In its view, the only thing that the trustee could request was that BH's estate should be administered. The claimant also made the further point that even when BH's estate was fully administered, the trustee would not be able to claim the assets then forming the residue, on the basis that H had been discharged from his bankruptcy, and an after-acquired property notice could not be served in respect of any property which the bankrupt only acquired after his discharge in view of section 307(2)(c) of the Insolvency Act 1986. In April 2006, the claimant brought proceedings seeking a determination pursuant to Civil Procedure Rules, SI 1998/3132, rule 64 of the question whether they should make payment of the residue of BH's estate to H as residuary beneficiary, or to the trustee.

The defendants to the claim were H and the trustee. The trustee issued a claim in the county court for possession and sale of the farmhouse. That action was transferred to the High Court so that it could be heard in conjunction with the instant proceedings for the claim under CPR Part 64. In the meantime H died. The first defendant (the executor) was the sole executor by appointment of H's will. In that capacity he was substituted for H as a party to the proceedings. The executor also became the executor of BH's estate by succession.

The issue arose as to whether, if a sole residuary legatee under a will became bankrupt but was automatically discharged from bankruptcy before the completion of the administration of the estate of the testator, the money and assets which were thereafter ascertained to form the net residuary estate were payable to him or to his trustee in bankruptcy. It was common ground between the parties that until the estate of a testator was fully administered, a residuary legatee or anyone claiming through him did not own or have any interest in any specific asset in the hands of the executor. Hence the parties were agreed that H had not, at the commencement of his bankruptcy, owned or had any proprietary interest in any of the specific assets in BH’s unadministered estate.

The court ruled:

(1) Upon the death of a testator, a residuary legatee had an immediate entitlement, arising from the terms of the will, to have transferred to him, at the completion of the administration of the estate, such assets (if any) as then formed the residue of the estate. That entitlement did not give the residuary legatee any present property interest in any of the individual assets forming the estate whilst it was being administered. Nor could it give the legatee any immediate interest of a proprietary nature in what was called 'the residue of the estate', because that was simply a concept which had no existence independent of the assets which were eventually found to comprise it, as and when the estate has been fully administered. The residuary legatee's immediate entitlement to future payment (if there were any assets left to form the residue) was, however, recognised and protected whilst the estate was in the course of administration by a right of action to compel the due administration of the estate (see [49] and [50] of the judgment).

The due administration of the estate, by its very nature, involved the application of the assets for the benefit of the creditors, the taxation authorities, legatees of various sorts, and (finally) the residuary beneficiaries. Because the entitlement to receive such assets as might comprise the residue in the future was the very foundation for the legatee's right to compel due administration of the estate, there was no sensible basis upon which the two could be separated. The right of action would not be given to a stranger to the estate who had no possibility of receiving such assets in the future. It was therefore correct to describe the right of the residuary legatee as a composite right to have the estate properly administered and to have the residue (if any) paid to him as and when the administration was complete. That composite right was a chose in action, which was transmissible, and accordingly fell within the first limb of the definition of 'property' in section 436 of the 1986 Act (see [50] and [51] of the judgment).

(2) When a residuary legatee became bankrupt, the chose in action which vested in his trustee in bankruptcy was the composite right that included the right to have the assets comprised in the residuary estate paid over to him at the end of the administration of the estate. Once that right vested in the trustee, the right would not re-vest in the bankrupt unless and until his bankruptcy debts and costs had been paid; and the right would be capable of being asserted by the trustee in bankruptcy against the executors, so as to preclude them from giving priority to any rival claims to the assets comprising the residue at the end of the administration. Even if a residuary legatee's right was limited to a right to compel due administration of the estate, the legatee would nevertheless still have an immediate 'interest' which would fall within the second limb of the extended definition of 'property' in section 436 of the 1986 Act (see [52] of the judgment).

Accordingly, H's entitlement to BH's residuary estate, including the right to receive the assets comprising that residue as and when the administration of the estate was complete, vested in the trustee by the operation of section 306 of the 1986 Act. The trustee thereupon became entitled, and remained entitled, to receive the assets representing the residuary estate as and when the administration of the estate was complete, in priority to the executor (see [70] of the judgment).
Stamp Duties Comr (Queensland) v Livingston [1964] 3 All ER 692 considered; Leigh's Will Trusts, Re, Handyside v Durbridge [1969] 3 All ER 432 considered.

Carr and another v Thomas

Citation: [2008] All ER (D) 158 (Nov)
Hearing Date: 17 November 2008
Court: Chancery Division
Judge: Judge Behrens sitting as a judge of the High Court
Representation: Michael Waterworth (instructed by Sparling, Benham and Brough) for the claimants. Michael O'Sullivan (instructed by TG Baynes) for the defendant.

Abstract: Probate – Will. Chancery Division: On the evidence in the instant case, despite suffering from brain cancer, the testatrix had testamentary capacity at the time he signed the will in issue.

Keywords: Probate – Will – Validity – Testamentary capacity – Testator diagnosed with terminal cancer – Testator making will despite secondary brain cancer – Whether testator having testamentary capacity.

Summary: By a will dated 4 October 2002, the defendant, the testator's sister was named as a principal beneficiary. Some time after making the 2002 will, the testator began a relationship with NM. NM began co-habiting with the testator around the time he was diagnosed as having terminal bowel cancer with secondary brain cancer. Shortly before the testator's death he instructed a solicitor to draw up another will under which the majority of his estate passed to NM. Pursuant to the will, the claimants, partners of the firm called upon to draft the new will, were named as executors. There was no contemporaneous medical assessment of the testator, who died in August 2006. The claimants sought probate of the will. The solicitor and her assistant that were called upon by NM and the testator to draft the new will both testified that the testator had capacity, the defendant contended otherwise, and medical evidence supporting both parties' contentions was adduced.

The issue for determination was the mental capacity of the testator.

The court ruled:

It was established law that it was essential that a testator should: (a) understand the nature of the act of making a will and its effects; (b) understand the extent of the property of which he was disposing; (c) be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind should poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

On the evidence, the testator had known and understood that he was making a will and what a will was. He had clearly considered the competing claims on his estate. In the circumstances, it was wholly unrealistic to suggest that he had not understood what he was doing. The testator had testamentary capacity and had approved of the contents of the will when he signed it.

The will dated 9 August 2006 would be admitted to probate.

Banks v Goodfellow [1861-73] All ER Rep 47 applied; Sharp v Adam [2006] All ER (D) 277 (Apr) considered.

Fraser and others v McArthur Stewart and others

Citation: 2008 Scot (D) 13/11
Alternative Citations: [2008] CSOH 159
Hearing Date: 14 November 2008
Court: Appeal Court, Court of Session
Judge: Lord Brailsford
Representation: Mr Sutherland (instructed by Anderson Strathern) for the pursuers. Miss Haldane (instructed by Dundas & Wilson) for the defenders.

Abstract: Wills - Negligence - In an action by disappointed beneficiaries against solicitors who wrongly advised a testator regarding the legacy of a croft and whom the testator had then instructed to prepare a will in accordance with that advice, the court held that the defenders owed no duty of care to the pursuers and accordingly the case fell to be dismissed as irrelevant.

Keywords: Testator instructing solicitors to prepare will in accordance with advice – Residuary beneficiaries claiming solicitors' negligence causing them loss of legacy of croft – Whether defenders owing duty of care to disappointed beneficiaries.

Summary: The second and third pursuers were residuary beneficiaries under a will of the late JF. The first pursuer was the widow of the late AF, a brother of JF. AF survived his brother and was a residuary beneficiary under JF's will. Following the death of her husband, the first pursuer was a residuary beneficiary of JF. The first defenders were a firm of solicitors and the remaining defenders were past or present partners in the firm. Prior to his death JF was owner of a croft near Fort William. It was averred that in 1997, being in poor health, he contacted the first defenders for the purpose of making a will, and that he intended that, apart from bequests to a charity and the church, that AF, the second and third pursuers and HF (a fourth residuary beneficiary who did not enter the process) were to become the beneficiaries of an equal share of the whole of the remainder of his free estate. It was averred that an employee of the first defenders advised JF that 'a croft could not be divided and that in order to pass on the croft he would require to nominate an individual as the tenant'.

JF was unhappy with that advice as it was contrary to his wishes for the disposal of his estate. Ultimately however he followed the advice and instructed the first defenders to prepare a will nominating an individual as tenant of the croft. A will was drafted nominating an individual and was signed on 4 February 1998. JF died on 12 July 1998 leaving that will as his final and operative testamentary statement. As counsel for the defenders accepted, the advice given to JF was wrong. It would have been possible to have prepared a will which gave effect to his intentions. It was averred that as a result of the wrong advice, which was negligence on the

defenders' part, the pursuers suffered loss, injury and damage. The loss was of a legacy of the croft with vacant possession. In a debate on the procedure roll the defenders argued a plea to relevancy and specification. Their motion was that the case should be dismissed. The pursuers submitted that a proof before answer of all pleadings should be allowed.

Counsel for the defenders' principal submission was that the case fell into the category of claims by intended or disappointed beneficiaries. In order relevantly to aver a case of negligence against solicitors disappointed beneficiaries had to offer to prove: (1) that they were intended beneficiaries under a will; (2) that the solicitors were aware that they were intended beneficiaries; (3) that the defenders failed to create a testamentary document that gave effect to the testator's intentions, and (4) that as a result of the defenders' negligence the pursuers had reasonably foreseeably been denied a specific legacy. Counsel drew attention to averments in the pleadings to the effect that JF gave instructions for the preparation of a will in the manner advised by his solicitors. A will had been prepared in accordance with the testator's instructions.

The case was not an example of defenders negligently failing to give effect to a testator's instructions. Accordingly, as a matter of averment, the case failed to meet all the conditions which were essential prerequisites to establishment of a valid claim. Counsel founded upon White v Jones, submitting that prior to that case it was accepted that solicitors did not owe a duty of care to third parties affected by the services rendered by the solicitor, and that the case established a very limited extension to the law to allow claims by disappointed beneficiaries in strictly limited circumstances being capable of expression and limitation in the four principles desiderated. Counsel for the pursuers submitted that the relevant factor was the point in time when solicitors might be said, as a matter of law, to have assumed responsibility for a testator's affairs. The defenders' position was that that point arose only when a will was made. That was an incorrect approach and the correct interpretation of White v Jones was that responsibility arose when the solicitor failed to give effect to the testator's intentions. If as a result of negligent advice the testator's intention was defeated then, on an application of the principle in White v Jones, the disappointed beneficiary had a right against the solicitor.
The court ruled:

In the circumstances the defenders owed no duty of care to the pursuers. Accordingly, the case fell to be dismissed as irrelevant.

In White v Jones the negligent solicitor failed to give effect to his client's instructions with a consequent, direct, loss by the beneficiaries. In the instant case there was no suggestion that the will the defenders prepared was other than a correct expression of the testator's last stated testamentary intentions. Those intentions might well have been formulated on the basis of the defenders' negligent advice. Nonetheless that negligent act was of a different character to the negligent act in White v Jones. The negligent act in the instant case was also perpetrated at a time when there was scope both for the mistake to have been recognised and, importantly, when there was in any event time for the testator to change his intentions.

There was a further distinction: as a matter of averment there was nothing in the instant case to indicate that the testator's ultimate intention was not that expressed in the will. For those reasons the court considered that White v Jones was not directly in point and that the ratio was not binding upon it. It found nothing in the decision which would allow it to construe that case in a wider way. On the contrary, the majority were at pains to restrict the applicability of their decision to cases where solicitors negligently prepared a will which did not reflect the testator's instructions. Whilst that might seem close to the situation in the instant case, it was different. That difference, albeit narrow, was important. If that was correct then the position remained that solicitors did not in general owe a duty of care to third parties.

White v Jones [1995] 1 All ER 691 considered.

Sprackling and others v Sprackling

Citation: [2008] All ER (D) 55 (Nov)
Alternative Citations: [2008] EWHC (Ch) 2696
Hearing Date: 6 November 2008
Court: Chancery Division

Judge: Norris J
Representation: Eason Rajah (instructed by Pitmans) for the claimant. Nichola Preston (instructed by Employment Law Services) for the first defendant. The second defendant did not appear and were not represented.

Abstract: Will - Rectification. Chancery Division: A claim to rectify the testator's will pursuant to section 20 of the Administration of Justice Act 1982 was allowed as the will in question had failed to carry out the testator's intentions as a consequence of failures to understand his true instruction.

Keywords: Will – Rectification – Failure to carry out testator's intentions – Whether testator intending to provide legacies in terms contained in will – Whether testator's instructions misconstrued – Whether rectification of will should be ordered – Administration of Justice Act 1982, section 20 (1).

Summary: Section 20 of the Administration of Justice Act 1982, so far as material, provides: '(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence [...] (b) of a failure to understand his instructions, it may order that the will shall be rectified so as to carry out his intentions [...]'

The testator died on 17 February 2006, leaving his two sons, the first and second claimants, a daughter, the third claimant, and his second wife, the first defendant. The testator had been a farmer and agricultural contractor. At the time of his death his assets had included freehold lands at Sandilands and Nyewood Farms (the farms). The first claimant and defendants were appointed as his executors. Clause 3.3 of the will gave a legacy to the first defendant of 'Sandilands Farm [...] [including] the fishing lake with access to the car park'. By clause 4 the testator made a further legacy in terms that, 'In the event that my brother [...] has predeceased me I give absolutely but subject to any tax my property known as Nyewood Farm [...]to [the first claimant]'. A dispute arose between the parties as to true instructions of the testator. The claimants maintained that the testator had intended to leave the first defendant the farmhouse, with its curtilage of garden, paddocks, fishing lake and its car park, together with access rights over the relevant farmland. The claimants and first defendant agreed that the testator had not intended to leave Nyewood Farm in the terms provided for in clause 4 of the will. The claimants brought proceedings under section 20 of the Administration of Justice Act 1982 to rectify the testator's will.

They submitted that mistakes had been made in the preparation of the will so that the will had not reflected the true instructions of the testator.

The court ruled:

On the evidence, the will had failed to carry out the testator's intentions in respect of the farms as a consequence of failures to understand his true instruction. (see [69] of the judgment). The will would be rectified.

Martin v Browne and another

Citation: [2008] All ER (D) 82 (Jul)
Alternative Citations: [2008] EWCA Civ 712
Hearing Date: 22 May 2008
Court: Court of Appeal, Civil Division
Judge: Arden, Lloyd and Lawrence Collins LJJ
Representation: Sarah Richardson (instructed by Howard Cohen & Co) for the claimant. Justin Holmes (instructed by Gordons) for the defendants.

Abstract: Will – Revocation. Court of Appeal, Civil Division: On the evidence, the judge had rightly granted the claimant summary judgment in respect of a dispute over the parties' mother's will.

Keywords: Will – Revocation – Destruction – Burning, tearing or otherwise destroying will – Defendants obtaining grant of probate on basis mother dying intestate – Claimants seeking declaration that will executed in 1983 was mother's last will and testament – Claimant obtaining summary judgment – Defendants appealing on basis that mother had torn up will –

Whether judge erring in concluding defendants having no real prospect of establishing mother tore up will.

Summary: The parties' mother, M, died in 2006, upon which the defendants obtained a grant of probate of M's estate on the basis that she had died intestate. The claimant brought probate proceedings seeking a declaration that M's will, which was executed on 28 September 1983, was her last will and testament. The claimant sought revocation of the grant to the defendants and a grant in solemn form to his solicitor, who was the attorney for the executor named in the will. The underlying issue between the parties was whether M had destroyed her will with the consequence that the estate, including the house, had to be divided amongst the ten surviving children. The claimant applied for summary judgment on the basis that M had executed only one copy of the will and the only executed copy was at all times, between its execution and her death, held by his solicitors. Accordingly, the will could not have been destroyed. The judge granted summary judgment. The defendants appealed.

It was common ground that summary judgment was appropriate if the defence had no real, as opposed to fanciful, prospect of success; and that the court should not undertake a mini trial on the statements and documents. However, the defendants submitted that an injustice had been done to them on the facts.

The appeal would be dismissed.

The dispute of fact for summary judgment purposes was not whether the defendants had seen M tear up a document, but whether the defendants had a real prospect of showing at trial that the document was an original, properly executed, version of the will. On the evidence, the judge had been right to find that there was no real prospect of the defendants establishing that M had to have torn up an original duplicate of her will (see [34] and [42] of the judgment).

Carr and others v Beaven and others

Citation: [2008] All ER (D) 289 (Oct)
Alternative Citations: [2008] EWHC 2582 (Ch)
Hearing Date: 29 October 2008
Court: Chancery Division
Judge: Floyd J
Representation: Peter John (instructed by Howard Pollock & Webb, Norwich) for the claimants. Michael Waterworth (instructed by Mills & Reeve LLP) for the defendants.
Abstract: Probate – Will. Chancery Division: The deceased had had the requisite testamentary capacity to execute a will in November 2000, on that basis, the court pronounced in favour of that will.

Keywords: Probate – Will – Validity – Testamentary capacity – Claimant executors seeking to admit will to probate - Defendants challenging testamentary capacity of deceased – Whether deceased having requisite capacity to execute will.

Summary: The claimants were the executors of the will of the deceased. The second claimant was the deceased's second wife. The first to fourth defendants were the deceased's children by his first marriage. They had enjoyed difficult relationships with their father: he had left the family home to live with the second claimant in 1971. Upon leaving the family home, he had made provision for his four children by creating a trust in their favour, into which he placed three fairly substantial properties. In September 1997, the deceased suffered a stroke whilst on holiday. The stroke affected him physically, causing some slurred speech and a lack of coordination. On 5 January 1998, he executed a will (the 1998 will) by which he made specific bequests of £10,000 to each of his four children. The trustees of the 1998 will were also directed to grant a lease of a cottage to S and his wife for a period not exceeding 60 years at a nominal rent.

The deceased's mental health began to deteriorate after 2000. A further will was executed n March 2000, albeit that the deceased's solicitor had expressed concerns in relation to his testamentary capacity. The solicitor had suggested obtaining a medical opinion so as to remove a 'question mark' over capacity. The medical practitioner diagnosed mild dementia. Those concerns notwithstanding, by the terms of the March 2000 will, the deceased removed

the bequests to his children and altered the provision relating to the lease to be granted to S. Subsequently, the deceased executed a further will on 17 November 2000 (the November 2000 will), which removed completely the provision relating to the grant of the lease to S. By the instant proceedings, the claimants sought probate in respect of the November 2000 will. The defendants resisted that application.

The principal issue that fell to be determined was whether the deceased had lacked the requisite testamentary capacity to execute the November 2000 will.

The court ruled:

While it was clear that the deceased's mental condition was deteriorating from the time of his first stroke, and that by November 2000 he was suffering from mild to moderate dementia, on the evidence, he had had the necessary testamentary capacity on the occasions on which he had given his instructions for and executed the November 2000 will. It was improbable that he retained that capacity when the 2004 codicil was executed, although, in the events that had happened, it was of little significance (see [82]-[90] of the judgment).

Accordingly, the court would pronounce in favour of the November 2000 will but not the 2004 codicil.

Couwenbergh v Valkova

Citation: [2008] All ER (D) 264 (Oct)
Alternative Citations: [2008] EWHC 2451 (Ch)
Hearing Date: 16 October 2008
Court: Chancery Division
Judge: Blackburne J
Representation: Jonathan Ferris (instructed by Cooke Matheson) for the claimant. The defendant appeared in person.

Abstract: Will - Testamentary disposition. Chancery Division: On the evidence, the testator of two wills had lacked the necessary testamentary capacity such that the last will would not be propounded.

Keywords: Will – Testamentary disposition – Testamentary capacity – Proceedings challenging validity of will – Evidence.

Summary: The testator died on 10 October 1991. She had made wills dated 12 September 1978, 19 October 1990 and 24 October 1990. Under the 1978 will, she appointed the claimant as her executor and, after a £500 legacy to a relative, left the remainder of her estate in equal shares to the relative's children and to the claimant. By the second will, dated 19 October 1990, the testator gave the whole of her estate to the defendant, whom she appointed to be her executrix. The gift was conditional on the defendant surviving the testator by 28 days, failing which she gave the whole of her estate to the defendant's younger sister. The will was witnessed by a Mr and Mrs D. The position of Mr D's signature troubled the solicitor who had drawn up the will. In the event, a fresh engrossment of it, in identical terms, was prepared for execution, dated 24 October 1990. That will bore the signatures of two Italian brothers, G.

The claimant, as the sole executor named in the 1978 will, entered a caveat on 21 October 1991 in the testator's estate and on 4 December 1991 entered an appearance to the defendant's warning dated 26 November 1991. That was very shortly after he and the testator's family were told of the existence of the 1990 wills. In February 1993, the claimant issued the writ in the action endorsed with a statement of putting the defendant to proof that the 1990 wills had been duly executed. Alternatively, he alleged that at the time the 1990 wills had been executed, the testator had lacked testamentary capacity and had not known, or approved, of their contents. The dispute came on for trial in July 1998. The due execution of the 1990 wills was effectively conceded and the trial concentrated on the testator's testamentary capacity and the allegation of want of knowledge and approval. The judge found in the defendant's favour. The police subsequently conducted an investigation into the circumstances of the testator's death. That led to the tracing of the two G brothers from whom statements were taken. Those statements came to the attention of the claimant in the course of proceedings concerning the costs of the litigation. The claimant renewed his application for

permission to appeal, on the basis of fresh evidence, against the judge's original order. The Court of Appeal subsequently set aside the judge's order (see [2005] All ER (D) 98 (Feb)) and remitted the action for retrial.

Evidence was heard, inter alia, as to the testator's confusion and short-term memory loss well before 1990, in addition to her increasing physical frailty and, as time had gone on, her diminishing mobility; and to the conduct of the defendant at the material time. Consideration was given, inter alia, as to whether the testator had lacked testamentary capacity.

The court ruled:

It was settled law that, if someone were to be mentally capable of making a will, it was essential that the testator should understand the nature of his act and its effect; should understand the extent of the property of which he was disposing; should be able to comprehend and appreciate the claims to which he should give effect, and, with a view to the latter object, that no disorder of mind should poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion should influence his will in disposing of his property and bring about a disposal of it which, if his mind had been sound, would not have been made. The testator should be able to recall those (whether related or not) who might be expected to be named in his will.

However, the law did not call for a perfectly balanced mind, nor was a will to be pronounced against merely because the testator was moved by capricious, frivolous, mean or even bad motives. Where a will was rational on its face, and duly executed, the court would pronounce for it, presuming that the testator was mentally competent so that the burden rested on those alleging it to adduce evidence of the testator's unsoundness of mind. However, once there was evidence before the court which credibly called into question the testator's capacity to make a will at the tie the will had been made, the burden shifted to those who sought to propound the will to prove affirmatively, on all of the evidence, that the testator had the required mental capacity to make it (see [245]-[247] of the judgment).

On the evidence, the testator had lacked testamentary capacity when she had made the 1990 wills. That was the clear opinion of the claimant's witness, who was impressive and persuasive. Secondly, the testator's mental decline had been progressive. Thirdly, whilst the defendant's evidence suggested that the testator would have been capable of fully understanding the effect and implications of the will she had made, it fell short of an opinion that the testator had possessed all of the attributes necessary to demonstrate testamentary capacity. If, as was established on the evidence, the testator had not been able to bring to mind whom her nearest relatives were, an essential element of testamentary capacity was absent even if, had she been able to bring them to mind, she might have decided not to benefit them in any way. Moreover, on the evidence, the testator had been operating under a disease of mind which had poisoned her affections towards a relative (see [276]-[280] of the judgment).

Legislation

Intestate Succession (Interest and Capitalisation) (Amendment) Order 2008

Jurisdiction: England; Wales
Enactment Citation: SI 2008/3162
Commencement date: 1 February 2009
Legislation Affected: SI 1977/1491 amended
Enabling Power: Administration of Estates Act 1925, section 47A(3A), (3B)
Abstract: SI 2008/3162: Capitalisation tables revised to reflect increases in life expectancy and decreases in the yields on government stocks.

Summary: Replaces the tables in the Schedule to the Intestate Succession (Interest and Capitalisation) Order 1977 with tables which have been revised to take account of increases in life expectancy and decreases in the yields on government stocks.

Amends SI 1977/1491, article 3(2) to reflect changes since 1977 in the way that the yields on UK government stocks are calculated. Medium coupon yields are no longer produced; however the yield figures for fifteen year UK government stocks are published as FTSE UK Gilt Indices on the web site of the Financial Times.

Taxes and Duties (Interest Rate) (Amendment) Regulations 2008

Citation: SI 2008/3234
Abstract: These Regulations amend the Taxes (Interest Rate) Regulations 1989 and the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998 to reduce the time taken to change interest rates in relation to unpaid or overpaid tax or duty.

Full Text:
Made - - - - 16th December 2008
Laid before the House of Commons 17th December 2008
Coming into force - - 7th January 2009

The Treasury make the following Regulations in exercise of the powers conferred by section 178(1) to (3) of the Finance Act 1989 and section 197 of the Finance Act 1996.
Citation and commencement

1. These Regulations may be cited as the Taxes and Duties (Interest Rate) (Amendment) Regulations 2008 and shall come into force on 7th January 2009.
Amendment of the Taxes (Interest Rate) Regulations 1989

2.--(1) The Taxes (Interest Rate) Regulations 1989 are amended as follows.
(2) In regulation 2(1) (interpretation)--
(a) for the definition of "operative date" substitute-- ""operative date" means--
(a) the eleventh working day after the reference date, or
(b) where regulation 3ZA or 3BA applies--
(i) where the reference date is the first Tuesday, the day which is the Monday next following the first Tuesday, or
(ii) where the reference date is the second Tuesday, the day which is the Monday next following the second Tuesday;", and
(b) for the definition of "reference date" substitute-- ""reference date" means--
(a) the second working day following the day on which the most recent meeting of the Monetary Policy Committee of the Bank of England took place, or
(b) where regulation 3ZA or 3BA applies--
(i) the day which is the Tuesday next following the day on which that meeting took place ("the first Tuesday"), and
(ii) the day which is the Tuesday ("the second Tuesday") occurring two weeks after the first Tuesday;".
(3) After regulation 2 insert--
"Applicable rate of interest equal to zero
2A. In determining the rate of interest applicable under section 178 for any purposes mentioned in these Regulations, if the result is less than zero the rate shall be treated as zero for those purposes.".
Amendment of the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998

3.--(1) The Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998 are amended as follows.
(2) In regulation 2(1)--
(a) in the definition of "operative day" for "sixth day of each month" substitute "eleventh working day after the reference day", and
(b) in the definition of "reference day" for "twelfth working day before the next operative day" substitute "second working day following the day on which the most recent meeting of the Monetary Policy Committee of the Bank of England took place".
(3) After regulation 2 insert--
"Applicable rate of interest equal to zero
2A. In determining the rate of interest applicable under section 197 for the purposes of any enactments referred to in these Regulations, if the result is less than zero the rate shall be treated as zero for those purposes.".

Dave Watts
Steve McCabe
Two of the Lords Commissioners for Her Majesty's Treasury
16th December 2008

Explanatory note
(This note is not part of the Order)

The Taxes (Interest Rate) Regulations 1989 specify rates of interest applicable for the purposes of the enactments specified in section 178(2) of the Finance Act 1989. The Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998 specify rates of interest applicable for the purposes of the enactments specified in section 197(2) of the Finance Act 1996.

These Regulations amend the definitions of "operative date" and "reference date" in the Taxes (Interest Rate) Regulations 1989 and the definitions of "operative day" and "reference day" in the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998. The purpose of the amendments is to reduce the time taken to change interest rates in relation to unpaid or overpaid tax. There is no change to the timing in relation to large companies where regulation 3ZA or 3BA of the Taxes (Interest Rate) Regulations 1989 apply, but consequential amendments are made to the definitions of "operative date" and "reference date" in those cases.

These Regulations also insert a new regulation 2A in the Taxes (Interest Rate) Regulations 1989 and in the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998 which provides that if the result of the calculation of the rate of interest under those Regulations for any purposes is less than zero, the rate shall be treated as zero for those purposes.

A full Impact Assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

Explanatory memorandum

1. This explanatory memorandum has been prepared by HM Revenue & Customs and is laid before Parliament.
2. Purpose of the instrument
2.1 These Regulations amend the Taxes (Interest Rate) Regulations 1989 (SI 1989/1297) and the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations 1998 (SI 1998/1461) in order to reduce the time taken to change interest rates in relation to unpaid or overpaid tax or duty.
3. Matters of special interest to the Select Committee on Statutory Instruments
None
4. Legislative Context
4.1 Rates of interest on unpaid and overpaid taxes and duties and the dates from when those rates should be applied are determined by the Taxes (Interest Rate) Regulations 1989 and the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations1998. The legislation allows for rates to be set either directly by Statutory Instrument, or by a Board's Order.
4.2 Regulation 2(1) of the Taxes (Interest Rate) Regulations 1989 defines "operative date" and "reference date"; regulation 2(1) of the Air Passenger Duty and Other Indirect Taxes (Interest Rate) Regulations1998 defines "operative day" and "reference day". The application of these provisions determines the rates of interest to be applied to unpaid and overpaid taxes and duties and the dates from which those rates should be applied.
4.3 This instrument amends the definitions of operative date and reference date and operative day and reference day to enable HMRC to apply any changes to interest rates more quickly than now from 7th January 2009.
4.4 This instrument also clarifies that if the interest rate calculated is less than zero the rate shall be treated as zero.
5. Territorial Extent and Application
This instrument applies to all of the United Kingdom.
6. European Convention on Human Rights
As the instrument is subject to negative resolution procedure and does not amend primary

legislation, no statement is required.
7. Policy background
7.1 HMRC is consulting on a package of changes designed to harmonise the charging and paying of interest across all taxes and duties. As part of this work consideration was given to reducing the time taken to make changes to these interest rates following changes in the Bank of England bank rate, as announced by the Monetary Policy Committee (MPC) at its monthly meetings.
7.2 The Government has decided to bring forward the particular proposal to reduce the time lag in changing the HMRC interest rates charged and paid by HMRC, so that following any changes in the Bank of England base rate HMRC can change its rates more quickly, as appropriate.
7.4 HMRC interest rates for taxes and duties are calculated using procedures laid down in legislation. These procedures require the application of formula which because of the continuing reduction of the base rate make it possible that a rate could be calculated less than zero. So that there is no misunderstanding about HMRC's position it has been decided to make it clear that if the result is less than zero the rate shall be treated as zero.
7.3 It is intended that these changes will first take effect in January 2009, so that HMRC will be able to pass on any necessary changes as a result of the MPC's January meeting and at any subsequent meetings.
7.4 These Regulations do not change the way in which the rates used by HMRC are calculated.
8. Consultation outcome
Consultation on the changes to these Regulations was not necessary as the amendments do not significantly change the existing law about interest rate- setting and changing processes.
9. Guidance
No additional guidance is required as no significant changes have been made to the existing processes.
10. Impact
An Impact Assessment has not been prepared for this instrument because there is no impact on business, charities, voluntary bodies or the public sector.
11. Regulating small business
The legislation may apply to small business but a Small Firms Impact Test has not been undertaken because the legislation does not alter the operation of existing procedures.
12. Monitoring & review
Not appropriate.
13. Contact
Robert Horwill at HM Revenue & Customs Tel: 020 7147 2447 or e-mail: robert.horwill@hmrc.gsi.gov.uk can answer any queries regarding the instrument.

Family Provision (Intestate Succession) Order 2008

Jurisdiction: England; Wales
Enactment Citation: SI 2008/Draft
Commencement date: 1 February 2009
Legislation Affected: Administration of Estates Act 1925 amended; SI 1993/2906 superseded in relation to the estate of a person dying on or after 1 February 2009
Enabling Power: Family Provision Act 1966, section 1(1)(a)(b)

Abstract: SI 2008/Draft: Statutory legacy levels increased from £125,000 to £250,000 where the deceased leaves children and from £200,000 to £450,000 in other cases.

Summary: Increases the statutory legacy from £125,000 to £250,000 where the intestate is survived by issue, and from £200,000 to £450,000 where there is no surviving issue but the intestate is survived by certain close relatives. This is the fixed net sum payable to a surviving spouse or civil partner from the estate of a person dying intestate, that is without leaving a valid will. The statutory legacy levels were last increased in 1993. The increase will apply in relation to the estate of a person dying on or after 1 February 2009.

Non-Contentious Probate Fees (Amendment) Order 2008

Jurisdiction: England; Wales
Enactment Citation: SI 2008/2854
Commencement date: 26 November 2008

Legislation Affected: SI 2004/3120 amended
Enabling Power: Courts Act 2003, section 92
Abstract: SI 2008/2854: Non-contentious probate fees adjusted

Summary: Amends the Non-Contentious Probate Fees Order 2004. Amendments are being made, firstly, due to the introduction of primary legislation or amendments to the Civil Procedure Rules, and secondly, to remove uncertainty and confusion caused by the current fees order.

Features

Actuarial tables on intestacy updated after 32 years

As of 1 February spouses and civil partners of people who die without leaving a will ('surviving partners') are to receive more generous payments if there are sufficient assets in the deceased's estate: £250,000 (double the present level) if there are also children or £450,000 (up from £200,000) if there are no offspring. As before, if there are children the surviving partner will also receive a life interest in half the rest of the estate--with the right to elect that the capital value of this life interest be paid to them (provided that this election is made within 12 months from the date of grant of representation).

Although not part of the consultation on the amount of the statutory legacies, the multipliers for calculating the capital value are also being updated under a statutory instrument, the Intestate Succession (Interest and Capitalisation) (Amendment) Order 2008, which was laid before Parliament in December. In most cases it is expected that the surviving partner would live on the interest or other income from their life interest (together with the other assets they receive from the estate and their own assets). But if they want to receive the capital value of their life interest instead, so that they receive a lump sum straightaway, the actuarial tables can be used to find a multiplier that is applied to the part of the estate in which the life interest subsists and for which an election is being made.

The multiplier is found by using a combination of the prevailing gross yield on fixed-interest Government stock and the age and sex of the surviving partner. So, for instance, the sum paid out as capital would be more generous if the person is 70 years old than if they were 50. In the past the yield part of the calculation was set with reference to 'medium coupon' yields but these are no longer produced. Sally Spicer of Wedlake Bell's private client team thinks the change is needed. "The actuarial tables were last updated in 1977 and since then life expectancy has improved and the yields on government stock has dropped," she says. "This means that the actuarial tables are outdated." Instead of using medium coupon yields, the new tables refer to 15-year government stocks as published on the FTSE UK Gilts Indices in the Financial Times.

So, while the old tables assumed a minimum rate of 8.5% or less for the calculation, the new tables go down as low as 2.5% or less. This can make a big change to the calculation. As an example, where the surviving partner is within the 70-90 age bracket and government stock is yielding less than 4.5 per cent, the surviving partner would receive more under the old actuarial tables than they will under the new ones. The current rate for 15-year government stock is 4 %and may well continue to fall lower.

However, even though she thinks it is useful to have this mechanism in place, Mrs Spicer queries whether it will always be necessary to use them. "It is possible not to use the actuarial tables at all," she says. "If all the children are adults, they can agree the capital value for the life interest with the surviving partner. It is only where some of the children are minors or where the children and surviving partner cannot reach an agreement between them that the actuarial tables will need to be used."

But there will be a tax reason against capitalising in some situations. "There may be a tax disadvantage in making an election to capitalise the life interest from an inheritance tax perspective," she says. "There is very likely to be more inheritance tax (IHT) to pay because the value of assets passing to the surviving partner--which benefits from the spouse/ civil partner exemption for IHT purposes--is reduced." If there is no capitalisation, then the value of all the assets in the part of the estate to which the life interest relates is free from IHT because they are all deemed to belong to the surviving partner. But if the survivor capitalises

all or part of the life interest, then the IHT charge on that part of the estate is recalculated and this is likely to result in the remaining uncapitalised assets being subject to IHT whereas they would have fallen under the spouse/civil partner exemption previously. So, a 65-year-old widow with children getting a 30.5 %capitalisation would receive that sum free of IHT, but if the estate is above the IHT threshold then the IHT on the remaining 69.5 %of assets that go to her children would be recalculated and an IHT liability would probably arise.

Although the actuarial tables may reflect falling yields on government stock, they also reflect longer life expectancy rates that may have a positive effect on the calculation for the surviving partner depending on the other circumstances. Life expectancy has been increasing at extraordinary rates in the last couple of decades. In the last 25 years male life expectancy at birth has gone up from 71 to 77 years and female life expectancy has gone up from 77 to 81.5.

In their own words: SI 2008/3162 Intestate Succession (Interest and Capitalisation) (Amendment) Order 2008

This Statutory Instrument has replaced the Schedule tables to the Intestate Succession (Interest and Capitalisation) Order 1977. LexisNexis asked Jon Golding, author of 'Tolley's Inheritance Tax' to comment.

Analysis

This Order replaces the tables in the Schedule to the Intestate Succession (Interest and Capitalisation) Order 1977 (SI 1977/1491) (LNB News 07/01/2009 1) with tables which have been revised to take account of increases in life expectancy and decreases in the yields on government stocks.

Article 3(2) is amended to reflect changes since 1977 in the way that the yields on UK government stocks are calculated. Medium coupon yields are no longer produced; however the yield figures for fifteen year UK government stocks are published as FTSE UK Gilt Indices on the web site of the Financial Times.

Jon Golding, author of 'Tolley's Inheritance Tax' comments on its impact:

In what circumstances will this legislation be of relevance? Where someone dies without leaving a will or has a will that is wholly or partly not valid and they are survived by a married partner or civil partner. In your view, what does this legislation highlight?
The need to have a valid will in place for married couples or those in a formalised civil partnership.

What do you think are the main effects of the Order?

To give an increased formalised inheritance to surviving married and civil partners of someone who has left no will (or the will or part of it is invalid in anyway) where there are children of the deceased and or relatives who too can benefit from the intestacy.

Are there any tax implications from this legislation? Yes a greater portion of the estate under these new intestacy rules will go to the surviving married partner/civil partner and be exempt from IHT at that stage. This may mean in cases of small or moderate estates that there will be a larger amount of transferable nil rate band for the Personal Representatives of survivor to claim on their death.

Are there any aspects of this instrument that practitioners will be happy/unhappy with?

Clearly there will be potential beneficiaries in small to moderate estates who will get a smaller share than before. Also, it does not apply to cohabiting couples where the survivor has no rights of inheritance unless assets are held in joint names.

Do you have any other views on the Instrument?

It could have perhaps been aligned to the annual nil rate band, currently £312,000, so that it increases on a regular basis. It should be remembered that the rules of intestacy in Scotland

and Northern Ireland are slightly different than these of England and Wales,

Hope value is not part of the price in leasehold enfranchisement

The House of Lords ruling in the joined appeals of Earl Cadogan v Sportelli [2007] EWCA Civ 1042; and Pitts v Earl Cadogan; Earl Cadogan v Atlantic Telecasters Ltd [2007] EWCA Civ 1280, [2008] RVR 244 has seen Lord Hoffmann dissenting from the majority led by Lord Neuberger on the vexed question of whether 'hope value'--an additional sum payable in the anticipation of selling to a special purchaser in the future--should be taken into account when arriving at the price to be paid by tenants on leasehold enfranchisement under the Leasehold Reform Act 1967 (the 1967 Act), sections 9(1) and (1A).

Dowden, solicitor and a member of the Property Litigation Association, says: "The result leaves 'hope value' in place, but only in very limited circumstances. It can be taken into account where tenants of a block of flats exercise their collective right to acquire the freehold in the building under the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act). The only 'hope value' that can be taken into account is that applicable to the possibility that non-participating tenants might negotiate an extension to their leases. It applies only to the possibility of a negotiated deal--not to the exercise of any statutory right to acquire an extension."

The decision could have a negative impact for some tenants who will have to pay more for the collective purchase of their freehold.

Various statutes since 1967 had conferred on owners of long leases of houses or flats rights to 'enfranchise' by buying out, individually or collectively with other lessees, the reversionary interests, or to extend their leases for defined periods. A key feature of the statutory provisions was a process for the assessment of the price at which the reversioner's interest, or the extended lease, was to be acquired. One valuation concept was 'marriage value' and related to that was 'hope value'.

Dowden explains: "Hope value is the uplift in value that might apply where a potential purchaser thinks that, in addition to its investment value, the freehold interest carries with it the potential benefit of a possible future sale of the freehold to the present tenant or a successor in title (or indeed the acquisition of the leasehold interest), thereby enabling a release of the marriage value in the future. That marriage value is the increase in value that occurs where a tenant acquires the freehold, or where a landlord acquires the leasehold interest so that the full value of the unencumbered freehold can be unlocked. The marriage value is the additional price that would be payable by a party in a position to unlock that value, as compared with a third party buyer who would have to take the freehold subject to the leasehold interest.

"The statutory method of valuing the freehold takes into account the marriage value that is attributable to the participating leaseholders' interests, but not that attributable to the non-participating leaseholders. The majority decision of the Lords means that the possible future marriage value relating to the non-participating leaseholders' interests can be taken into account as hope value under paragraph 3 of Schedule 6 to the 1993 Act."

Justifying this exceptional treatment of Schedule 6, Lord Neuberger commented: 'It would be both arbitrary and unfair, in my judgment, if a landlord, who can recover marriage value in relation to the participating tenants' flats, could not recover hope value in respect of the non-participating tenants' flats. It would be arbitrary because, in so far as they are purchasing the reversion to non-participating tenants' leases, the participating tenants are acquiring an investment, whereas, in so far as they are purchasing the reversion to their own leases, they are acquiring greater security in their homes.' His Lordship also saw the availability of hope value in the case of non-participating tenants as a means of preventing collusive action which would artificially reduce the price payable to the landlord.

Lord Hoffmann's dissent was strident. Commenting in particular on the fine distinctions drawn by Lord Neuberger, he said: 'It seems to me that your Lordships have formed a view of what construction fairness to landlords requires and have determined to force the language of the statute to yield up such a meaning. I am less confident of what fairness requires [...] I am therefore not prepared to accept that the apparent mismatch between the inclusion of

marriage value (for participating tenants only) and exclusion of hope value (for all tenants) produces such an obvious injustice as to require heroic methods of construction to avoid it. I would dismiss all the appeals.'

It is worth noting that the House of Lords dealt very shortly with the Cadogan estate's argument on human rights, Dowden says: "Cadogan's lawyers argued that the Court of Appeal's finding that hope value should be excluded be upheld, the law does not comply with Article 1 of the First Protocol to the European Convention on Human Rights and must be reinterpreted. Because the House of Lords found by a majority that the matter could be resolved by applying the ordinary principles of statutory interpretation, the Human Rights Act was not engaged."

Competence of professional trustees called to question

The competence of professional trustees is under the spotlight. Jan Miller talks to Paul Hewitt, partner, Charity Legacy and Contentious Trust and Succession Group, Withers LLP and Dan McCourt Fritz of Serle Court Chambers.

A particularly bitter recent dispute, Jones and others v Firkin-Flood and another [2008] EWHC 2417 (Ch), [2008] All ER (D) 175 (Oct) has been heavily publicised not just because of the money involved--some £14 million derived from a property and leisure portfolio--and its contested distribution between three siblings, but also because of the inadequacies of the appointed trustees, one of whom was a solicitor.

Paul Hewitt of Withers LLP says the trustees' conduct was sufficiently extraordinary for the judge to refer to "a total abdication of their duties [...] The lay trustees failed to ascertain the nature and extent of their duties and, quite shockingly, no trust accounts were ever prepared", he says. "Additionally, the trustees failed to supervise the management of the trust companies so completely that when "I" (the youngest beneficiary) decided independently to sell the trust companies in 2007 did not consider whether such a sale would be in the best interests of the beneficiaries."

The judge who ultimately directed three of the four trustees to stand down rejected a submission by the trustees' counsel that trustees should not be removed unless there is deliberate fault. "Their failure was described as not one of dishonesty or of deliberate breach but rather primarily of unfitness," Mr Hewitt says.

The judge found that the trustees were ignorant of their duties because the professional trustee failed to explain them. Mr Hewitt explains: "The judge identified Mr Jones, the professional trustee and a solicitor, whom the deceased had expected to provide appropriate advice and guidance to his lay colleagues, as being principally responsible for the trustees' collective abdication of duty." Because the three lay trustees did not know what their obligations were, most of their breaches of duty were breaches of omission rather than of commission.

Dan McCourt Fritz of Serle Court comments that trustees eager to avoid being dragged into disputes should heed the fundamental lessons that emerge from Jones v Firkin-Flood. "Clearly, trustees are less likely to be involved in litigation if they discharge their duties, and they are more likely to discharge their duties if they appreciate what they are. Lay trustees would therefore be well advised to consult the trust documents, an accessible text (eg Tolleys) and to speak to the professional advising them to gain an accurate understanding of their rights and obligations.

"Further, if lay trustees have any doubts as to the competence or adequacy of the professional trustee with whom they are working they should seek independent legal advice at the earliest possible opportunity."

Probate lawyers increasingly taking advantage of Inheritance Tax Relief

Probate lawyers have their ears to the ground when it comes to detecting changes in valuations of properties and stocks and shares. A year ago, John Murray, tax and trusts partner in Guilford-based Stevens & Bolton, was used to seeing properties go up 10 %in the

nine months it typically took to sell after the death of the owner. Nowadays, the property is more likely to go down 10 per cent.

Like other lawyers operating in this field, Murray is taking regular advantage of provisions that allow the tax bill to be reduced if the eventual sales prices of land or buildings and securities are less than the IHT valuation. "The shares relief is being used left, right and centre," he says. Under the provisions the bill can be reduced for land and buildings sold within four years of the owner's dealth, and for securities sold within 12 months of the death.

"With the FTSE 100 having fallen over 40 %since its peaks at the end of last year the shares exemption is very commonly used," he says.

He adds: "HM Revenue & Customs do look at these very carefully. It takes three to four weeks to get the refund." The property claims take slightly longer, he says. "The process to get the relief is slightly more laborious as you generally need more documentation." In one recent deal the HMRC insisted on seeing that the purchaser of the property had registered his ownership as well as seeing the contract documentation. Murray thinks that the HMRC staff working in this field are working flat out: "They have a huge amount on their plate."

Experienced practitioners will be aware of the traps in this area but some younger people may not have worked before in a time of falling share and property price. "To claim loss relief the property has got to be sold by the executors and not by the beneficiaries," he says. This means that he tends to keep the title in the name of the deceased or to transfer it to the executors but would be much less likely to transfer it to the beneficiaries. If more than one property is sold by the executors then the sums involved have to be amalgamated for the purposes of the relief calculation--even if that means including properties that were sold at a higher price than the valuation at death. And, as the HMRC outlines on its website, "you cannot withdraw a claim for relief if it proves to be disadvantageous following any subsequent sale."

According to Murray, this relief could help many families who receive legacies from an estate big enough to pay IHT. IHT is payable at 40 %on the excess of an estate over the nil-rate band, currently £312,000. The average house price has fallen £26,400 from £198,500 in September 2007 to £172,100 in September this year, according to the Halifax. If the whole of the house were in the part of the estate subject to IHT, a refund could be claimed of £10,560, based on these prices.

Until now Murray has seen few cases where there has been concern that the loss relief for properties could be lost by falling foul of the four-year deadline. This could be more of a problem in the future, especially if buyers become aware of this kind of problem and use it as a bargaining tool.

Articles

Wills and probate: stop press:
Journal Name: New Law Journal
Author: Michael Tringham
Citation: 159 NLJ 64
Issue Date: 16 January 2009

Summary: Discusses a number of recent developments in probate law. Subjects discussed include, the launch of referral services and will registries to protect against the danger of being unable to find a will, possible problems associated with the retirement of older practitioners because there is now more of an emphasis on commercial rather than private client work and problems caused in Guernsey by Norman customary law that means illegitimate children automatically have a share in property.

Keeping it safe
Journal Name: Taxation
Author: Camilla Vivian
Citation: Taxation, 15 January 2009, 32
Issue Date: 15 January 2009

Summary: Considers whether or not offshore trusts remain useful for wealth management in 2009. Discusses inheritance tax advantages, the income tax and capital gains tax benefits which have been watered down but remain. Also considers possible future changes that may increase tax revenue from non-domiciles and offshore trusts in light of the current economic downturn and the various non-tax benefits of offshore trusts.

Legal update: probate

Journal Name: Law Society Gazette
Author: Lesley King
Citation: (2008) LS Gaz, 18 Dec, 11
Issue Date: 23 December 2008

Summary: Covers bankruptcy and inheritance tax problems caused by falling values. Many practitioners are finding that falling stockmarket and land prices are causing inheritance tax (IHT) headaches for families. IHT valuations are made at the date of death so, in the current climate, families may find they are being forced to pay tax on a value that can no longer be realised. A further problem is that, once the IHT value is fixed, no account is taken of falls in value unless relief is available under the Inheritance Tax Act 1984.

Wills and probate: the right to inherit

Journal Name: New Law Journal
Author: Michael Tringham
Citation: 158 NLJ 1747
Issue Date: 15 December 2008

Summary: Assesses the increase in disputes relating to wills. Although bigger legacies are one factor--in 2007-2008 over 30,000 estates were worth more than £300,000--it's not only the amount at stake that tempts litigants. Fragmented family structures – multiple marriages and cohabitations – mean that children from a first marriage or long finished relationship can feel left out.

Exit strategies

Journal Name: Trusts and Estates Law & Tax Journal
Author: Elizabeth Neale
Citation: Trusts and Estates Law & Tax Journal, November 2008, 18
Issue Date: 1 November 2008

Summary: Trusts and Estates Law & Tax Journal, November 2008: Continues an analysis of the inheritance tax (IHT) "relevant property" regime, in the second of two articles on the subject. Considers how the risks inherent in the complexities of the relevant property regime (RPR) affect the way in which the IHT charges are calculated. The RPR is straightforward in concept.

Valiant survivors

Journal Name: Taxation
Author: Louise Somerset
Citation: Taxation, 20 November 2008, 549
Issue Date: 20 November 2008

Summary: Discusses the future of offshore trusts in light of the legislative changes made by the Finance Act 2008. Considers the limited benefits of offshore trusts for UK domiciled settlors and beneficiaries and contrasts with the greater benefits for non-UK domiciliaries. The non-tax benefits of offshore trusts are examined.

Islamic principles on adoption: Examining the impact of illegitimacy and inheritance related concerns in context of a child's right to an identity

Journal Name: International Journal of Law, Policy and the Family
Author: Shabnam Ishaque
Citation: IJLP&F 2008 22 (393)

Issue Date: 1 December 2008

Summary: Revolves around the importance of surnames and the role these play, not only in context of history and culture but also in regards to the social reality along with a sense of being for such children in their particular environment. Core values are universal and thus can provide a window into entering a dialogue with the ultimate aim of protecting the child. It should be recognized that Islamic principles are open to differing interpretations and thus can adapt through a consensus (ijma) to address the problems that did not exist in their historical context.