

THORNLEYS SOLICITORS

DISPUTES AND CLAIMS RELATING TO WILLS, TRUSTS & APPLICATIONS UNDER THE INHERITANCE (PROVISION FOR FAMILY & DEPENDANTS) ACT 1975

IS THERE OR MIGHT THERE BE A DISPUTE?

WHAT CLAIMS CAN ARISE ON DEATH IN RELATION TO WILLS OR TRUSTS?

Thornleys can offer specialist advice, amongst other things, on the following areas which may arise:-

- Challenges to Wills on the basis of undue influence and want of knowledge and approval
- Administration of Estates during disputes
- Applications to remove Executors/Trustees
- Claims for financial provision under The Inheritance Provision for Family & Dependants) Act 1975
- Actions for negligence against incompetent or negligent Personal Representatives/Solicitors
- Applications for Rectification of Wills
- Applications by Executors for directions from the Court
- Applications to the Court for directions relating to the Construction of Wills
- Applications to the Court on behalf of Beneficiaries
- Applications to the Court for sanction in relation to decisions made by Executors/Trustees
- Applications for Beddoe Orders to obtain the Court's sanction for the commencement of proceedings
- Advice relating to sham Trusts or problems in relation to Trusts already set up
- Forced Heirship (often a problem in relation to foreign property and foreign Will
- Recovering assets and asset tracing

It is unfortunate that on occasions there are claims or disputes over Wills. Enduring Powers of Attorney or Trusts. Sometimes a Will is challenged by a Beneficiary or Beneficiaries or people excluded from the Estate by the Will, alleging that the Will was invalid because the proper formalities had not been adhered to.

Alternatively a challenge to the Will may be raised on the basis that the maker of the Will lacked the necessary testamentary capacity at the time the Will was made or lacked knowledge and approval as to the contents of the Will. Sometimes it is alleged that the person who made the Will was subjected to undue influence or



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fraud by those who stand to inherit under it. On occasions there are challenges to Wills occasioned by inadequate drafting of the Will, particularly in the case of 'hand-made' Wills.

In addition to challenges to Wills, sometimes there is a need to seek the Court's sanction to rectify a Will to ensure that the Will reflects the wishes of the person who made the Will.

Even where a Will is valid and proved to probate, the Personal Representatives, Trustees or Executors of the Will may not fulfil their functions properly or thoroughly. There may be disputes between Beneficiaries over assets or interpretation and sometimes an application to the Court is necessary to sanction or determine a decision.

THE INHERITANCE (PROVISION FOR FAMILY & DEPENDANTS) ACT 1975

This is an Act which empowers the Court to make Orders for the making out of the Estate of the deceased person, provision for the spouse, former spouse, child, child of the family or dependant of that person. It is important to recognize that even if a valid Will has been made it is still possible for certain categories of applicant to make claims for provision out of the Estate. In order to satisfy the ground for bringing the claim the person who intends to pursue it, must show that the disposition of the Deceased's Estate effected by his/her Will or the Law relating to intestacy, or the combination of his/her Will and the Law, is not such as to make **reasonable financial provision** for the Applicant.

The categories of applicant under the Act are limited but include:-

- The husband or wife of the Deceased;
- The former wife or former husband of the Deceased who has not remarried;
- A child of the Deceased (this includes a child of a non-marital relationship, a legitimate or adopted child and a child not yet born but expected);
- Any person (not being a child of the Deceased) who, in the case of any marriage to which the Deceased was at any time a party, was treated by the Deceased as a child of the family in relation to that marriage;
- Any person (not being a person included in the aforementioned paragraphs of this section) who immediately before the death of the deceased was being maintained either wholly or partly by the Deceased;
- A person (if the Deceased died on or after the 1 January 1996) who, during the whole of the period of two years ending immediately before the date when the Deceased died was living;
 - (a) in the same household as the Deceased and
 - (b) as the husband or wife of the Deceased
- A surviving Civil Partner or former Civil Partner is entitled to pursue a claim under the Act. This applies to same sex couples under the Civil Partnership Act 2004.

Under the Act the Court can make an Order for reasonable financial provision which can include monetary periodical payments, a lump sum payment, transfer of property, settlement of property comprised in the Estate or a variation of any anti-nuptial or post-nuptial settlement.

There is a strict time limit in which to bring proceedings under the Act (normally six months from the date of Grant) however there is provision to make an application out of time although each case is looked at on its own merits. Claims should normally be issued within six months of the date of Grant.

TRUSTS

The Law relation to Trusts is Complex

A Trust should only be set up with the benefit of legal advice. Because of the complexity of Trust Law there can be many difficulties. A Trust can fail. If it was not created validly it could amount to a “sham” Trust. It is also feasible to cast doubt on the validity of the Trust even though the arrangements to satisfy a valid Trust have been set out. For instance, the Trustees appointed by the Trust must have:

- Complete and defacto control of the Trust property
- The Trustees are obliged to and do in fact, apply their minds to the management of the property or the exercise of powers ostensibly settled on them
- The Trustees are required to observe some standard of care, however undemanding
- There are limits placed on the use of Trust property or some restraint on permissible options for investment
- The Trustees are obliged to produce accounts
- The Trust is free from powers of revocation, amendments or variations imposed by the settlor of the Trust

The general rules are that Trusts are irrevocable once completely constituted, no deviation is allowed under the Terms of the Trust and that variation is only permitted with the compliance of capable beneficiaries or with the sanction of the Court.

WHAT HAPPENS IF THERE IS A BREACH OF TRUST?

The general rule is that a breach of trust is committed where:

- The Trustee breaches a Trust Duty, or
- The Trustee in the exercise of this or her powers or discretions, acts otherwise and without absolute honesty, or fails to observe the required standard of care

A TRUSTEE MUST:

- Bring the Trust property under his control
- Acquaint himself with the nature and circumstances of the Trust property
- Disclose circumstances that might cause him to exercise discretionary powers improperly
- Obey the lawful directions of the Trust instrument
- Act impartially i.e. exercise his/her powers without favouring one beneficiary, or class of beneficiaries, over another
- Invest in authorized investments
- Maintain the appropriate standards of care in the management of the trust and exercise discretion

A Trustee must also exercise the powers in the Trust Deed within those powers, honestly and in the interest of beneficiaries.

Other duties such as ensuring that the beneficiaries pay the right person, not delegate the exercise of their duties, inform beneficiaries, supply information and be ready to produce Trust accounts. Most importantly a Trustee cannot personally enter into a transaction with Trust property.

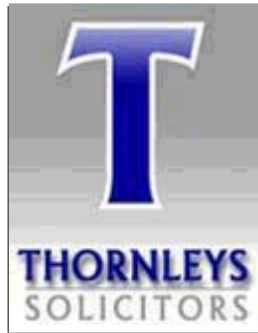
Sometimes it is necessary to remove a Trustee or make an application to the Court for directions as to the Trust or the determination of an issue effecting the Trust.

LASTING POWERS OF ATTORNEY

Sometimes there are claims relating to the capacity of a donor to validly execute a Power of Attorney. It is also an unfortunate fact that sometimes Attorneys abuse their position. It should be added that most Attorneys are honest, decent people. Some however take liberties and a few are, in the words of a well known Judge, “out and out crooks”. Financial abuse probably occurs in 10-15% of cases involving registered Powers of Attorney.

WHAT CAN THORNLEYS DO TO ASSIST

Thornleys will be able to advise on any issues relating to problems with Wills, Lasting Powers of Attorney, Trusts including, if necessary, asset tracing and making applications to the Court.



At Thornleys, we are committed to providing the best possible professional service to all of our clients, both business and personal. We have produced our Fact Sheets and Articles as part of this service but they are intended only as a guide to highlight general issues which may be of interest to our clients. They are not a substitute for professional advice. Specialist advice and assistance should be sought in relation to any particular needs or circumstances. Accordingly, no responsibility for loss, or consequential loss however occasioned, to any person acting or refraining from acting as a result of any material in this publication, can be accepted by Thornleys Solicitors Ltd howsoever caused.

Our Private Client Team at Thornleys have the specialist knowledge and expertise in various matters and would be pleased to discuss and advise you regarding specific needs.

ASSOCIATED FACT SHEETS AVAILABE:-

FACT SHEET 2 – Appointing Guardians in your Will

FACT SHEET 3 – Inheritance Tax

FACT SHEET 4 – Trusts including Discretionary Will Trusts

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