St John's
CHAMBERS

Settling Inheritance Act 1975 Claims

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Court assisted mediation

Inheritance Act 1975 claims can be issued in the Family or Chancery Divisions of the High Court or in the County Court.

The County Court has unlimited jurisdiction in respect of 75 Act claims, section 25 County Court Act 1984. However, if there are other claims alongside (eg. validity of wills), or the claim is complex, the High Court may be appropriate.

Whichever Division is chosen the Civil Procedure Rules ('CPR') rather than the Family Procedure Rules ('FPR') apply.

However, the Financial Dispute Resolution ('FDR') appointment procedure, as described in FPR 9.17 and PD 9A is frequently utilised in order to assist the parties in reaching settlement.

'Parties attending the FDR appointment must use their best endeavours to reach agreement on matters in issue between them.' FPR 9.17(6)

Parties are expected to make without prejudice offers prior to the FDR appointment and are expected to file with the court details of all offers and proposals, and the responses to them. These are then returned to the parties at the end of the appointment.

'The judge hearing the FDR appointment must have no further involvement with the application, other than to conduct any further FDR appointment or to make a consent order or a further directions order.' FPR 9.17(2)

Cases involving minors, or adults who lack capacity ('protected parties').

CPR Part 21 applies and a litigation friend is required.

CPR 21.10(1) means that no settlement shall be valid without the approval of the court.

Dunkirk v Whitwood [2004] 1 WLR 462. This cuts both ways, it is not binding on the non child party either.

Where agreement has been reached but proceedings have not been issued there is a special procedure for seeking the court's approval of the settlement.

CPR 21.10(2) provides that parties should use the Part 8 procedure in this situation.

PD 21, para 5 contains a checklist of what must be supplied, and 'except in very clear cases' this must include an opinion on the merits of the settlement.

In Inheritance Act claims any settlement can be approved by a District Judge or Master. The usual limit of £100,000 for compromises on behalf of persons under a disability does not apply, CPR PD 2, para 5(1)(a).

Costs.

CPR 46.4(2) provides that the 'general rule is that the court must order a detailed assessment of the costs payable by, or out of money belonging to, any party who is a child or protected party'.

The exceptions to this rule are set out in PD 46, para 2.

(a) where there is no need to do so to protect the interests of the child or protected party or their estate;

(b) where another party has agreed to pay a specified sum in respect of the costs of the child or protected party and the legal representative acting for the child or protected party has waived the right to claim further costs;

(c) where the court has decided the costs payable to the child or protected party by way of summary assessment and the legal representative acting for the child or protected party has waived the right to claim further costs; and

(d) where an insurer or other person is liable to discharge the costs which the child or protected party would otherwise be liable to pay to the legal representative and the court is satisfied that the insurer or other person is financially able to discharge those costs.

Tax considerations

Section 146 of the Inheritance Tax Act 1984 ('ITA') provides that the terms of any order are read back into the disposition on death so any award will be treated for inheritance tax purposes as if it devolved under the terms of the will or intestacy.

This explicitly means that there will be no tax charge if a property leaves a trust (IHT exit charge) or a life interest determines due to an Inheritance Act order.

Therefore if a claim is brought against an estate where the claimants are exempt, ie. spouses or civil partners, it is essential that any claim is settled by way of a court order or in such a way as to be retrospective.

Deeds of variation

This can also be achieved through a deed of variation without the need for a court application, section 142 of the ITA. However, there are various conditions and a valid deed of variation must be:

- Within two years of death.
- In writing.
- Signed by all of the persons who would benefit under the unvaried disposition.
- State explicitly that it is made pursuant to section 142 of the Inheritance Tax Act 1984 and/or section 62 of the Taxation of Chargeable Gains Act 1992 [This replaced the requirement that all deeds of variation had to be submitted to HMRC prior to 11 March 2008].
- Contain a statement by the Personal Representatives where it results in additional tax being payable.
- There must be no consideration in money or money's worth for entering into a deed of variation.
- Can only be in respect of property that falls within the estate, so a deed that transfers property that passed by survivorship would not be retrospective for tax purposes regarding that property.
- Assets in an estate can only be affected by one deed of variation, *Russell v IRC* [1988] STC 195, [1988] 2 All ER 405.

The Revenue have relied strictly on these provision where they believe tax evasion is going on, *Lau v HRMC* [2009] STC (SCD) 352, [2009] WTLR 627. In this case, the Deceased left £665,000 free of tax to each of his children, the residue to his wife. Grossed up this was £1,108,333. The wife offered to give the children £1 million each if they renounced their legacies, splitting the tax saving. The Revenue successfully enforced the tax on the grounds that the deeds of variation were void as they had been made for consideration.

However, in their manual (IHTM35100) the Revenue state that they will not apply the consideration rules in order to defeat a deed of variation made to settle an Inheritance Act claim.

Importantly, a deed of variation is only fully retrospective for inheritance tax. It will often be for capital gains tax purposes, under section 62 of the Taxation of Chargeable Gains Act 1992, however, this retrospectivity does not apply to all aspects of the transaction. For example, the identity of the settlor for capital gains tax purposes following a deed of variation will be the person who is giving up assets to create the trust, not the deceased: *Marshall (Inspector of Taxes) v Kerr* [1995] 1 AC 148, [1994] 3 All ER 106. A deed of variation is not retrospective for the purposes of income tax at all.

Whereas, section 19 of the Inheritance Act expressly provides that an order is retrospective for all purposes, and this would include income and capital gains tax.

Re Goodchild [1997] 1 WLR 1216 [1997] 2 FLR 644 *Mirror wills*

The deceased disinherited his son in favour of his second wife. The son brought a successful inheritance claim. The order in February 1996 was drawn up to provide a trust to the second wife until March 1996(!), then to the son. There would therefore be no IHT due to the spouse exemption, unless the second wife died within seven years. However, Morritt LJ commented at 658

> 'If the order made is properly within the jurisdiction of the court the fact that it was sought with the motive of seeking to achieve a better tax position is usually irrelevant: *Re Sainsbury's Settlement, Sainsbury v First CB Trustees (Practice Note)* [1967] 1 WLR 476. But where the effect of the order is to confer a substantial advantage on the parties at the expense of the Revenue it is in my view important that the court should be satisfied that the order is not only within its jurisdiction but also one which may properly be made.'

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