The disappointed beneficiary

Nicholas W Holroyd suggests some remedies that may be available, under Scots law, to the disappointed beneficiary

There is something almost oxymoronic in a 'disappointed beneficiary'. If they benefit, they are a beneficiary. If they do not benefit, they are not a beneficiary. However, a moment's reflection causes one to realise that there are numerous situations where a person may be aggrieved at being 'cut out' of an estate completely or receiving substantially less than anticipated.

In a great many cases, the disappointed beneficiary will be without a remedy as well as without a share of the estate. In at least some situations there may be a remedy.

I concentrate on situations without a trans-national complexion. However, I observe that the estates and lifestyles of high net worth individuals often straddle jurisdictions, with all that that may entail for practitioners.

The nature of disappointment and some glimmers of hope

One must first identify the nature of the disappointment and then consider how (if at all) it may be addressed.

Problems with the estate

A smaller than expected estate may give rise to disappointment amongst those left behind. The size of the estate may reflect the testator's weakness for fast women or slow horses. However, it may reflect some wrong suffered by the testator during his lifetime, which would have been actionable by him had he lived and which may now be actionable by his representatives.

Claims by third parties should not be overlooked. A further danger for executors and disappointed beneficiaries is that of the wrong person bringing the claim. For example, in the English case of *Clarke* v *Bruce Lance & Co.* (1988) 1 WLR 88, CA the disappointed beneficiary sued the solicitors of his late father for failing to advise their client (the plaintiff's father) that he should not grant an option for a fixed price over a petrol station. The Court held that the advice was not part of the will making process and the son had no claim. The authors of the English textbook *Flenley & Leech Solicitors' Negligence* (1999) para. 9.4 footnote 3, comment: 'One oddity is that the claim was not brought by the estate.'

A particular item that was once in the testator's estate may no longer be in the estate. Issues related to pre-death disposals apparently made under a power of attorney may arise. The disappointed beneficiary may seek to argue that the power of attorney did not entitle the attorney to make the disposal. Although raised by the tax authorities and not beneficiaries, *McDowell's Executors* v *IRC* (2004) STC (SCD) 22 is instructive. The Special Commissioners made clear that a power of attorney should be construed narrowly, especially in relation to gifts.

To avoid, or at least minimise, post death criticism, those considering disposing of the property of a person labouring under an incapacity ('the adult'), may wish to consider recourse the *Adults With Incapacity (Scotland) Act 2000* (the *2000 Act*). It has been used to make an order renouncing a claim by the adult for legal rights in the estate of the adult's spouse: M, Applicant 2007 SLT (Sh. Ct.) 24. It has also been used to make a codicil to a will to ensure that the person named in the will to receive the adult's principal asset (a house) would not suffer complete disappointment if the house was sold: T, Applicant 2005 SLT (Sh. Ct.) 97.

Recourse to the *2000 Act* may also reduce scope for arguments over whether or not the disposal gives rise to ademption: Eccles & Miller 'T, Applicant' 2006 SLT (News) 1-7.

Restrictions on testamentary freedom

Some restrictions on what a testator can do with his property arise from the nature of the title upon which his property is held. For example, where each *pro indiviso* owner of a house has contributed to the purchase price and there is an un-evacuated special destination, the testator may be precluded from bequeathing the property: Kerrigan *Drafting for Succession* (2004) para.s 3-39 and following; and Anderson *Survivorship Destinations* and s. 142 of the *Inheritance Tax Act 1984* 2007 SLT (News) 241-244, especially 241 column 2 to 242 column 1.

An advisor's failure to take into account such considerations when advising a testator might occasion criticism, perhaps, even a claim against him: Kerrigan para. 3-40 and the English case *Kecskemeti* v *Rubens*

Rabin & Co. TLR 31 December 1992.

I also pause to observe that lack of testamentary freedom may raise its head where 'immoveable property' held by UK nationals in certain foreign countries.

Provisions against disinheritance

Most systems of law contain provisions designed to preclude a testator from completing disinheriting certain classes of persons, such as close relatives and dependents (Scottish Law Commission's Discussion Paper on Succession August 2007 No. 136 (SLC) para. 3.2).

In Scotland at the moment, there is currently an elaborate but sometimes less than generous system of legal rights benefiting spouses, children and now civil partners (SLC para. 3.2).

Claims for legal rights can sometimes have consequences that are not easy to foresee (Seafield's Trustees, Petitioner 1975 SLT 31).

The Scottish Law Commission has made tentative suggestions for reforming the legal rights regime (SLC Part 3.B). Accordingly, this is an area that must be monitored for changes.

At present, Scots law contains some protection for cohabitants but only on intestacy (*Family Law (Scotland) Act 2006*, s. 29; & SLC para.s 3.58 and following).

Will inconsistent with contract

Occasionally a person maintains that the will made by the deceased is not only contrary to his (the disappointed beneficiary's) expectations but in breach of the contract between him and the deceased. In one recent case, *De Lathouwer* v *Anderson & Ors* (2007) CSOH 54, 2007 SLT 437, the legal relevance of such an argument was upheld and the suggestion made that if the facts of the claim were established a claim in damages would lie against the estate.

Similar, but not identical issues may arise in relation to promises to make a will. In the past, such cases were hampered by the requirements of proof by writ or oath, see *Gray* v *Johnston* 1928 S.C. 659, especially Lord Hunter at p. 668 2nd full para. Today, the *Requirements of Writing (Scotland) Act 1995*, s. 1(3) may create problems. For example, it has been suggested that the making of the promise cannot simply be inferred from the actions alleged to have been performed in reliance upon it. See Reid & Blackie *Personal Bar* (2006) para.s 8-05 and following.

Remedies collectively referred to under the heading of 'restitution' or 'unjustified enrichment' may be worth considering but the courts have generally been reluctant to recognise them in the context of disappointed beneficiaries: Gray & Stewart para. 5.11.

Reedie v *Yeaman* (1875) 12 SLR 625 is a rare example of a successful restitution type claim or more accurately one where the pursuer was in part successful: especially Lord Young at 628 column 2; and Stewart The Law of Restitution in Scotland (1992) para.s 4.21

The case law on restitution and unjustified enrichment in the context of disappointed beneficiaries should be treated with great care. The law in this area is ripe for review and possibly ready a more generous approach.

Challenges to the will

There are many grounds upon which a will may be challenged, including but not limited to the following:

- Forgery
- Force and fear
- Failure to comply with the formalities of execution
- A combination of the will taking the form of a universal settlement without making any provision for the birth of a subsequent child and such a child being born and that child seeking to have the will set aside, the so-called *conditio sine testator sine liberis decesserit*. *Greenan* v *Courtney* (2007) CSOH 58; 2007 SLT 355 is a recent example of an unsuccessful attempt to invoke this principle.
- Lack of testamentary capacity
- Facility and circumvention
- Undue influence

Claims against the testator's solicitors and those undertaking similar responsibilities

For present purposes it is enough to observe that for many years it was thought that a solicitor in Scotland could not be sued by a disappointed beneficiary. *Robertson* v *Fleming* (1861) 4 Macq. 167 was cited as authority for this view in various cases: e.g. *Weir* v *J.M. Hodge & Son*, and *MacDougall* v *MacDougall's Executors* 1990 SLT 266.

There were indications in Robertson & Watt & Co. 2nd Div. 4th July 1995 Unreported that the court did not consider itself bound by *Robertson* v *Fleming*.

In the English Appeal to the House of Lords in *White* v *Jones* 1995 A.C. 207 the majority of their Lordships confirmed that a duty of care was owed in English law by a testator's solicitor to beneficiaries. It was also suggested that the passage in *Robertson* v *Fleming*, which was relied upon by the defender in *White* did not form part of the *ratio decidendi*: Lord Goff of Chieveley at 259.

Holmes v *Bank of Scotland* 2002 SLT 544, 2002 SCLR 481 now provides Scots authority for the proposition that professionals (such as solicitors or banks) who accept instructions to prepare a will owe a duty of care to those who would benefit under it to prepare the will within a reasonable time: *Holmes* v *Bank of Scotland* 2002 SLT 544, 2002 SCLR 481.

It remains to be seen what other claims will sound in damages and how they may be defended.

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Practitioners should be live to the possibilities of non-court-based solutions to their clients' problems. However, in some cases, legal issues (e.g. minor beneficiaries) or more personality orientated problems may stand in the way of such creative solutions.

Conclusion

Those whose hopes of inheritance have been confounded will almost by definition be bereaved and will often be emotionally vulnerable. An ability to analyse the nature of the disappointment suffered and a familiarity with possible remedies will only take practitioners so far. As with many other areas of practice, people skills and pragmatism are also required. As far as the latter is concerned, it is particularly important to make an objective assessment of prospects and expenses and regularly monitor and report upon the same to the client.

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