

# Update: charities

**James Aspden** considers recent developments concerning the protection of gifts to charities including mental capacity, *laches* and disputes over costs in probate claims

**FOUR RECENT CASES** highlight the complex and varied legal issues that can affect charities' fundraising income, in particular from substantial lifetime gifts and legacies.

## Costs in probate claims

The judgment in *Perrins v Holland & Ors* [2009] EWHC 2558 (Ch) was mentioned in the previous charity law update (*Solicitors Journal* 153/36, 29 September 2009) but perhaps of even more importance to charities is Lewison J's decision on costs. It demonstrates the importance of making offers of settlement in relation to probate claims, even on ungenerous terms.

The claimant, David, had tried unsuccessfully to challenge the validity of the deceased's will. Having lost, he attempted to avoid liability for the defendants' costs, and even to have his costs paid out of the estate. The parties' combined costs were over £180,000 but the net estate was worth approximately £160,000.

David tried to rely on both of the costs exceptions that can apply in probate claims: 1) if the dispute was 'caused' by the testator/the residuary beneficiary, then the losing party's costs may be paid out of the estate; and 2) if it was reasonable for the losing party to require the will to be proved in solemn form, then there may be no order for costs.

He failed to invoke the first exception. His argument was that the legal executive who prepared the will did not follow the 'golden rule' and gave an inaccurate statement. The resulting uncertainty made litigation necessary, David argued. Lewison J rejected this. He found that the legal executive's conduct was not the cause of the litigation. By dealing with the argument in this way, Lewison J avoided having to answer a more difficult question: if the legal executive *had* been the cause of the litigation, would the first exception then have applied? As written, the exception only appears to be available when either the testator or a residuary beneficiary has caused the litigation; not when the professional employed to prepare the will caused it.

The second exception did apply. The deceased's disability, coupled with the



*The case of Gill v RSPCA is one of many raising proprietary estoppel issues*

information the claimant had available, made it reasonable to seek the court's view on validity. David did not benefit from this exception though because of an offer of settlement the defendant made before joining the proceedings. She had offered £10,000 in settlement both of David's probate claim and his claim under the Inheritance (Provision for Family and Dependents) Act 1975, with no provision for costs. Lewison J thought that David should have accepted, so made him liable for the defendant's costs from the point at which she became a party to the proceedings.

This was an instance of one public policy principle overcoming another. The desirability of encouraging settlement in probate claims, and of avoiding disproportionately expensive litigation, was more important

than the desirability of allowing suspect wills to be considered by the court. That the defendant could render it unreasonable for David to continue by making such a derisory offer may encourage the use of tactical offers in future probate litigation, if the size of the offer is of less relevance than the fact of having made it. Compare the approach taken in the costs decision in *Zoran Kostic v Malcolm Chaplin and Ors* [2007] EWHC 2909 (Ch) though, where the claimant's offer was considered too low to affect the parties' liability for costs.

In probate claims, as in any other litigation, the *Perrins* decision provides further illustration that the parties should actively attempt to achieve settlement or risk being punished by an avoidable liability for costs.

## Mental capacity: statutory wills benefiting charity

Charities increasingly find themselves named as respondents to statutory will applications because the applicant seeks to increase, or more commonly reduce, bequests made to them in the will of a mentally incapacitated person ('P').

*Re: M* [2009] EWHC 2525 (Fam) is useful for the judge's thorough analysis of the weight which should be given to the various factors which the court must take into account before deciding what is in P's best interests. It also shows that the Court of Protection will, in suitable cases, protect or even reinstate bequests to charity using a statutory will.

P was a childless widow. She had made wills in 1996 and 2001 and a codicil in 2003, in each case leaving the bulk of her estate to charities.

From June 2004 until October 2008, P lived with and was cared for by Z and his family. On 30 September 2004, P executed a will leaving her estate to Z and made an enduring power of attorney empowering him to manage her financial affairs. Between then and January 2006, Z received a total of over £177,000 from P, being the whole of her savings and capital with the exception of her house. Despite several court orders requiring him to do so, P never explained what had happened to the money.

In 2007, the local authority stepped in, believing that it was not in P's best interests to remain living with Z and questioning his suitability as her attorney. A deputy was appointed in 2008, who applied in January 2009 for a statutory will – P having lost testamentary capacity.

The judge reviewed the law relating to statutory wills. He held that there is no hierarchy between the factors; the weight a particular factor will have depends on the circumstances of the case. He also held that in some cases, certain factors may have "magnetic importance".

He then reviewed one of the factors in detail: the wishes and feelings of P, both past and present. Although this will always be a significant factor, the weight to be given to it will vary depending on the circumstances of each case. In particular, the court will have regard to the degree of P's incapacity, the strength and consistency of P's views, the impact on P of knowing that her wishes are not being carried out and the extent to which the wishes P has expressed cannot sensibly be implemented.

The judge held that it was not in P's best interests to make any provision for Z. It

was not in P's best interests to provide for someone who had not acted in her best interests and had defied court orders. He approved a statutory will leaving the bulk of the estate to the charities.

## Laches in relation to an undue influence claim against a charity

The decision on preliminary issues in *Azaz v Denton and Self Realization Meditation Healing Centre* [2009] EWHC 1759 (QB) includes guidance on the use of *laches*, the equitable doctrine that can bar a claim from proceeding when delay has made it unfair to the defendant to allow it.

The claimant, a doctor, brought various claims against the Self Realization Meditation Healing Centre and its founder, including an undue influence claim. He joined the centre in 1992, giving up his medical career and donating all of his assets. He left the centre in 2004. When he joined, the claimant signed a 'joining agreement', and when he left he signed a 'leaving agreement'. Both agreements stated that he was not subject to any influence when he gave his assets to the centre and the leaving agreement confirmed that he would make no claim against the centre in relation to the assets he had donated.

The claimant intimated a claim through his solicitors in 2007, then issued proceedings in 2008. He claimed (among other things) that he had been subject to undue influence by the centre's representatives when he gave his assets to them upon joining in 1992.

The centre argued successfully that the claims should be barred by *laches*. By signing the joining and leaving agreements, the claimant had induced the centre to believe that he would not seek to set aside his donations. Having done so, fairness required the claimant to take action to repudiate the donations as soon as he decided to do so. The longer he delayed, the more unfair it became to permit him to assert that he was not bound by what he had signed. His delay of three years before intimating a claim was long enough to make it unfair to the centre to allow him to pursue his claims, so they were barred by *laches*.

Charities should note that delay in intimating a claim can be fatal to it, even where no formal limitation period is applicable.

## Proprietary estoppel

In the wake of *Re Gill (Gill v RSPCA)* [2009] EWHC B34 (Ch), proprietary estoppel is

an area of the law to which charities who receive substantial legacy income will pay particular attention. The recent case of *Macdonald and Ors v Frost* [2009] EWHC 2276 (Ch) demonstrates that a proprietary estoppel claim can fail entirely if there is a lack of causal link between the promises made and the detriment suffered by the claimants.

The deceased died in May 2006. His will left his entire estate to his second wife (the defendant). The estate consisted mainly of the matrimonial home, which was in the deceased's sole name and which he had formerly shared with his first wife.

The deceased's two daughters by his first wife (the claimants) brought a proprietary estoppel claim against his estate. They claimed that their parents had promised to leave the survivor's estate to them in 1986 and that, in reliance on this promise, each of the daughters agreed to pay £100 a month to their parents until the survivor's death.

Some of the elements of a successful proprietary estoppel claim were present: the deceased told the daughters they would inherit his estate, and they did make payments of £100 a month until his death. What was missing was a link between the two; the deceased's assurances were not intended to be promises, and the daughters' payments were not made in reliance upon them.

The daughters made their payments in return for an advance of their inheritance from their parents, in 1986. The deceased gave no indication that he intended to leave his estate to them until 12 years later.

This case affirms the importance of examining the whole sequence of events carefully when considering a proprietary estoppel claim, as claimant or defendant, and to consider carefully the timing of any promises made and detriment suffered. There ought to have been an identifiable causal connection between them if the claim is to have merit. A detailed investigation of the facts relied upon in a proprietary estoppel claim can reveal inconsistencies that may cause the claim to fail entirely.

These are only four examples out of the hundreds of similar cases that reach trial each year, and they are the tip of the iceberg. Although the issues vary, one message for charities is clear: be proactive.

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