



# IMfocus

## Wills, Trust and Estate Disputes

Winter 2014

### In this edition:

- > Gavin Faber joins Birmingham team
- > The life of the deceased is placed in the memory of the living
- > Dying to live together
- > Bringing the Law of Inheritance into the 21<sup>st</sup> Century

## Welcome...

...to the first edition of Focus on Wills, Trust and Estate Disputes by Irwin Mitchell. The Wills, Trust and Estate Disputes team are in a busy period with The Inheritance and Trustees' Powers Act which came into force on 1 October 2014. This act modernises the law for those left in circumstances where people die without making a Will. We look deeper into this subject later on in the newsletter. The team also celebrated maintaining their place in the top tier ranking in the recent Legal 500 results, with Paula Myers listed as a leading individual.

In this edition we welcome Partner Gavin Faber to the Birmingham team and explore the issues faced when Cohabitants do not make a Will before dying.

We hope you enjoy this newsletter and welcome any feedback you may have.



**Paula Myers**

Partner

Wills, Trust and Estate Disputes

E: [paula.myers@irwinmitchell.com](mailto:paula.myers@irwinmitchell.com)

 Follow us on Twitter @WillDisputes\_IM

If you have any feedback on this edition, or have any suggestions for future articles, please contact Paula Myers at [paula.myers@irwinmitchell.com](mailto:paula.myers@irwinmitchell.com) or call 0870 1500 100

# Gavin Faber joins Birmingham team



**W**e are delighted to announce that we have appointed a specialist wills, trust and estate disputes partner to grow our private client offering in the Midlands.

Gavin Faber, who joins the Birmingham office, makes the move from Higgs & Sons and is a well-regarded litigator who works on behalf of people involved in problems with wills and trusts.

Paula Myers said: "Gavin is an experienced litigation lawyer and his appointment enables us to grow our specialist Wills, Trust and Estate Disputes service in the Midlands region.

Our team has been ranked number one in the recent independent Legal 500 guide and

we are delighted that Gavin is joining us so that we can help more people to resolve their disputes."

Gavin added: "I'm delighted to join Irwin Mitchell which has developed an excellent reputation across the country for its work in helping people involved in disputes regarding wills, trust and estates.

There is strong national team in place to help support me and I can't wait to get started in the Birmingham office."

Gavin is an affiliate member of Society of Trust and Estate Practitioners (STEP) and holds the Advanced Certificate in Trust Disputes. He is one of the few full members of the Association of Contentious Trust & Probate Specialists in the West Midlands and a member of the Professional Negligence Lawyers Association.

## The life of the deceased is placed in the memory of the living

**U**nfortunately that memory can be soured by disputes between loved ones in relation to the decisions made regarding the funeral. With people leading increasingly complex lives and with only one third of people having a Will, such disputes are increasing.

Here is a brief summary of the current law regarding funeral arrangements.

### Ownership of the body

No-one can own the deceased's body. It cannot therefore form part of the estate and the beneficiaries cannot claim any value over it. The exception to this rule is where the body has undergone a process which causes it to acquire "value" e.g. dissection, embalming. The key issue is whether the body is something more than a corpse awaiting burial.

Although no one owns the body, a person can possess a body for the purposes of disposal. This is where matters can become tricky. The Personal Representative has an entitlement to possession.

If the deceased left a Will, the Executor appointed under that Will is entitled to possession of the body. The right of the Executor appointed under the Will is prioritised over family members without a grant.

The difficulty is that two thirds of people die without a Will. In that case, the representative rights rest with those who take a grant of Letters of Administration. This can often lead to disputes between those with an equal entitlement to the grant, for example:

- The parent of a deceased child
- A householder in whose possession the body resides
- When the deceased dies in hospital, the hospital being in lawful possession of the body may arrange for the disposal of the body in certain exceptional situations. This may arise where a Personal Representative has not been appointed or there is a dispute over the validity of the Will
- The local authority to the area in which the body was found if no other arrangements had been made.

The next of kin does not have the right or responsibility to dispose of the body. However the next of kin may be entitled as a result of being a Personal Representative.

### The deceased's wishes

It used to be the case that the Personal Representatives should consider the

deceased's wishes but were not bound by them. This now needs to be placed in the context of the Human Rights Act 1998 (HRA) and in particular:

1. The right to respect family life; and
2. The freedom of thought, conscious and religion.

There have been a few challenges under HRA and the Court has now given guidance on what is of key importance. This includes the deceased's wishes, as well as the wishes of family and friends, the place the deceased was most closely connected with, and the practicalities of arranging the funeral.

### Ashes

There is a difficulty with ashes in that there is potentially a wide class of applicants who can apply to deal with the ashes and the regulations governing their disposal (The Cremation (England and Wales) Regulations 2008 ("the Regulations")) do not set out the framework for dealing with disputes.

At a time when the close family may not be in a position to make arrangements for cremation, they may lose the right to deal with the ashes if they don't apply under the regulations. It is therefore important that they apply if there is a risk of a dispute over the disposal of ashes.

Whilst there is nothing illegal in dividing ashes between family members, this is unattractive and unlikely to be the approach adopted by the courts. This can create very difficult situations that can be costly and upsetting to resolve.

# Dying to live together

**W**hen a couple move in together two things they tend not to have at the forefront of their minds are death and separation.

This is understandable – it's hardly very romantic to be the one to raise the subject of "what will happen if one of us dies, or if we split up?" However, taking such a rose-tinted view and failing to address the inevitable could leave both exposed to significant risks.

Cohabiting is increasingly becoming the social norm. There are at least 2.9 million unmarried cohabiting couples of the opposite sex in the UK and 12.3 million married couples – so around one fifth of couples living together are unmarried.

This article looks at some of the potential pitfalls for cohabiting couples and consider how to avoid them.

## The legal position

Most people still mistakenly believe that living with someone confers legal rights after a period of time. In fact, the legal position for cohabiting couples remains far removed from that of a married couple or civil partners who have chosen to change their legal status.

## On death

Where the deceased has not made a Will making provision for an unmarried cohabiting partner, there is no safety net under the intestacy rules – unmarried partners are simply not provided for and that is not set to change in the foreseeable future.

There are limited ways in which an unmarried partner can inherit if there is no Will or if a Will makes little or no provision for them. Under the Inheritance Provision for Family and Dependents Act 1975 ("the 75 Act") a claim can be made for reasonable financial provision:

- as a dependant if they were being maintained at least partially by their partner before they died; and/or
- as a cohabitant provided they have lived in the same household as the spouse or civil partner of the deceased for a continuous period of two years immediately prior to death.

They will not be entitled to the same sort of level of provision as a spouse would be (i.e. the equivalent of the provision that would be made on divorce) – the award is simply what is reasonable in all the circumstances and is described as being for their "maintenance" – there is no concept of a fair share.

If they have bought the property together and it is in joint names the default position is that they hold it as joint tenants. This means that if one of them dies the other will benefit from the automatic right of survivorship and

receive the deceased's share of the property.

Frequently, couples do not address how the property is held, even where they have contributed to it unequally (and it is not uncommon for conveyancers to fail to flag up the issue), so a survivor who has paid little or nothing towards a property may end up as sole owner. But this will only assist a cohabitant whose name is on the title where the joint tenancy has not been severed.

## Take avoiding action

So while the law remains as it is, unromantic as it may seem, prevention is undoubtedly better than the cure. Even if there may be a possible remedy such as a claim as a dependent under the 75 Act, it is clearly preferable if the cost and stress of legal proceedings can be avoided.

The benefit is not just for the surviving partner. Failure by the deceased to make arrangements which include appropriate provision for a partner means that they no longer control what happens to their own estate. The door is open for a 75 Act claim which if successful will deplete the estate further because it will have to bear the significant legal costs on both sides.

A cohabitation agreement in the form of a deed is legally binding and can deal with as much or little detail as the couple feel inclined. From the basic division of the equity in the home to who will pay which bills and own which chattels.

## Doing the following could save money and heartache

1. Consider how property is going to be held and how you would want it to be treated if you separate or die:
  - a. Who is on the legal title?
  - b. Should there be a declaration of trust to reflect an equity split which differs from the legal position?
  - c. Who is responsible for the mortgage?
  - d. Who will pay for repairs and improvements?
2. Consider a cohabitation agreement.
3. Discuss making a Will and make sure you both do so. You may wish to make mutual Wills.
4. A Will should specifically address what happens to a property you jointly own or live in if one of you dies. It is worth talking to a specialist and considering the full range of options – for example you could preserve the equity in your property so that it ultimately passes to your children but still avoid hardship to a partner by carving out a life interest for them.
5. Don't do one thing in isolation of another – make sure your Will, any declaration of trust and cohabitation agreement complement each other rather than conflict.
6. Make sure your cohabitation agreement stays relevant – consider contingencies if you have children or if your circumstances change and think about whether to build in a review clause.
7. Also keep your Will up to date so that the people you want to benefit do so. Remember, separation from someone with whom you cohabit does not invalidate a Will.



# *Bringing the Law of Inheritance into the 21<sup>st</sup> Century*

**T**he Inheritance and Trustees' Powers Act 2014 ("the 2014 Act") came into force on 1 October 2014. It reformed the intestacy rules to reflect the more modern family and also changes were made to the existing Inheritance (Provision for Family and Dependents) Act 1975 ("the 1975 Act"), under which certain categories of claimants can make a claim against someone's estate if they have not received reasonable financial provision under a Will or intestacy.

Although claims by spouses where there is a Will remain unaffected, the 2014 Act improves the position on intestacy for surviving spouses, meaning that fewer spouses may need to make claims under the 1975 Act. However, it may lead to an increase in claims for adult children who would otherwise have received a greater share of a deceased parent's estate on intestacy.



## Some of the key changes being made to the 1975 Act:

### **Claims by stepchildren/people treated as children**

Prior to the updated law, a person could make a claim if they had been "treated as a child of the family in relation to a marriage to which the deceased was at any time a party". This means that a person could claim against the estate of someone who was married to their parent. Although there are other classes, the most common type of claimant under this section is a stepchild. The new Act removes the requirement for the treatment as a child to have been in relation to a marriage. The new requirement is that the deceased must have stood in a role akin to that between a parent and child, which will give rise to potential new claimants. For example, a person will be able to claim against the estate of their parent's late partner (regardless of whether they were married) which reflects the rise in cohabiting unmarried couples. A person will also be able to claim where the person who treated them as a parent was single.

contributed more to the relationship than the claimant did. It is no longer necessary to show that the deceased had formally "assumed" responsibility for the claimant's maintenance. Instead the Court will take into account the extent to which the deceased had assumed responsibility for the claimant in deciding what constitutes reasonable financial provision.

The changes will open up this category to situations where the claimant and the deceased were mutually dependent on each other. An example of someone who might now be able to claim is a non-cohabiting couple where each had assumed some responsibility for each other, rather than the assumption of responsibility being all one way.

### **Claims by people maintained by the deceased**

Previously a person could make a claim if they were being maintained by the deceased. The new Act removes this requirement, providing they could show that the deceased

### **Claims before a Grant of Probate is issued**

The new Act confirms expressly that proceedings can be issued before a Grant of Probate is obtained. This will assist claimants in estates where no one has taken out a grant (or is perhaps refusing to take out a grant thus preventing a claim being issued).

For more information on the new act visit our website  
[www.irwinmitchell.com/inheritance-act-2014](http://www.irwinmitchell.com/inheritance-act-2014)

[www.irwinmitchell.com](http://www.irwinmitchell.com)

Follow us on Twitter @IrwinMitchell

To see a list of our offices please visit our website.

Irwin Mitchell LLP is a limited liability partnership registered in England & Wales, with number OC343897, and is authorised and regulated by the Solicitors Regulation Authority. All Scottish cases will be handled by a separate Scottish legal practice, Irwin Mitchell Scotland LLP, which is regulated by the Law Society of Scotland.

