In dispute

Baynes v Hedger & anor: A lesson for charities. By **Emily Campbell**

Charities are often in the position of defending claims by alleged dependants, brought in respect of the estate of a deceased in which charity is interested. These claims are made under the provisions of the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"). For this reason, charities will find the recent decision of the Court of Appeal in *Baynes v Hedger & anor* [2009] EWCA Civ 374, [2009] WTLR 759 (CA), affirming [2008] EHC 1597 (Ch), [2008] WTLR 1719 (Lewison J) of particular interest. This article considers claims brought by alleged dependants under the 1975 Act following that decision, with an emphasis on points of interest to charities.

The facts of the case are very unusual. The scene was set in an English country house, Dunshay Manor in Dorset. The deceased was a well-known sculptress, Mary Spencer Watson, whose father had been a portrait painter and Fellow of the Royal Academy and whose mother had been a mime artist. The claimant was a resting actress, Hetty Baynes. Hetty was at one time married to Ken Russell, the well-known film director. The deceased had formed an intimate relationship with Hetty's mother, Margot, in the 1950's, whilst the Baynes family were renting Dunshay Manor from the deceased. Hetty's father moved out of Dunshay Manor, and Hetty and her older siblings were raised in substance as if they were children of the deceased and Margot, with the deceased occupying the role of father figure.

A complex history

The deceased's relationship with Margot continued in some form or other until the deceased's death. The deceased died in 2006 leaving Dunshay Manor to a charity, the Landmark Trust, and residue on trust for the primary benefit of Margot. Hetty, however, received only a legacy of £2,500. Hetty had had a history of financial problems, and brought a claim under the 1975 Act on the grounds that she was being maintained by the deceased immediately prior to her death. The deceased had been very generous to Hetty, and had frequently helped her out of a fix, and there was evidence that she was intending to do so again just before she died. The evidence was appropriately dramatic. A witness explained how the deceased, when on her death bed in hospital, had taken off her oxygen mask and said: "I can't be doing with this, I've got to get up. I've an important meeting this morning, I have to make sure Hetty is settled, looked after, that she has what she needs from the estate. I've got to get it sorted."

Margot, who suffers from Alzheimers and was therefore a "protected party" within the meaning of Part 21 of the CPR, also brought a claim under the 1975 Act on the basis that she was a dependant and alternatively that she was a cohabitee of the deceased.

High Court dismissal

The High Court dismissed Hetty's claim, and the Court of Appeal dismissed her appeal. The High Court held that, while Hetty had (by a narrow margin) standing to bring a claim, the provision made by the deceased for Hetty was reasonable in all the circumstances. The Court of Appeal held, by contrast, that Hetty did not even have standing to bring a claim. In other words, it held that Hetty's claim ought to have failed at an earlier stage of the analysis. Both Courts considered the basis upon which the deceased had assumed responsibility towards Hetty, as they were required to do by the 1975 Act. In substance, the message was that Hetty had been lucky for what she had already received, and could not reasonably expect any more. The Judge clearly felt that Hetty had been pressurising the deceased into helping her, and was unimpressed with her conduct. He stated: "In my judgment she exploited Mary's generosity at the end of 2005 and the early part of 2006 and brought

pressure to bear on her to bail her out yet again … For Mary to have succumbed to the pressure would have jeopardised either her ardent desire to see the Dunshay Manor estate preserved as a memorial to 80 years of artistic endeavour, or would have deprived Margot of money which may be needed for her care. This is not conduct which, in my judgement, should be rewarded."

The Court of Appeal, in dismissing Hetty's appeal, reiterated the principle described in *Re Beaumont* [1980] Ch 444 (Sir Robert Megarry V-C) and in *Jelley v Illiffe* [1981] Fam 128 (CA), namely that assumption of responsibility was relevant not only to a consideration of the reasonableness of the provision which had in fact been made for the applicant and to the exercise of the discretion by the Court (as directed by section 3(4) of the 1975 Act), but also to the question of whether an alleged dependant had standing to bring a claim under section 1(1)(e). It was in this respect that the Judge had erred.

The High Court held that, on the facts of the case, Margot did not have standing to bring a claim, and there was no appeal against this finding. In relation to her claim as a dependant, the Court concluded that the existence of a property and a trust fund which had been given for the benefit of Margot by the deceased some years beforehand and which were being enjoyed by Margot when the deceased died could not be described as a substantial contribution towards Margot's needs at the material time, i.e. immediately prior to the death of the deceased.

The freedom principle

The case can be regarded as a victory for the principle of freedom of testamentary disposition. The decision of the Court of Appeal emphasises that the basis upon which the deceased assumed responsibility for a person is relevant to the question of whether the person has standing to bring a claim as a dependant (i.e. whether within section 1(1)(e) of the 1975 Act the person is "*any person … who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased*"). The case shows that a deceased person can make provision for a person without necessarily assuming responsibility for continuing to do so, provided that the provision is made on this basis.

The case highlights various considerations which are of importance to charities when defending a claim under the 1975 Act, and I will focus on a few of these. Of course, when engaging in estate litigation, charities are always concerned about their reputation in arriving at a tactical strategy. Defending the deceased's wishes as set out in a Will will frequently serve reputational concerns, unless this involves defending a strong and ultimately successful claim.

The claimaint's standing

The first consideration is that a charity ought always to consider carefully the question of the claimant's standing to make a claim. Charities are frequently under pressure at the early stages of this type of litigation to concede standing in favour of a claimant with an obvious close nexus to the deceased. Indeed, the author has experience of a case management conference in the Family Division, when she was representing a charity, where the judge was incredulous that the charity had not conceded standing as a matter of course. The claim was by an alleged dependant/cohabitee, and the case management conference took place at a stage before the claimant had given proper information concerning her claim. Charities should not yield to pressure to concede standing before the evidence in relation to this issue has been presented, and should then usually do so only in a plain case.

The second is that charities should be wary of interim payment applications, and should offer interim payments on a voluntary basis only in the plainest cases. An interim payment application was made by Hetty in the *Baynes* case, which was (following a variety of interim hearings) ultimately adjourned to the trial and was therefore dismissed. Had an interim payment been awarded, it would (it turns out) have been awarded to a person who did not even have standing to bring a claim. It is very doubtful that any of the payment could have been recovered. The case is a salutary lesson in the dangers of interim payments.

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Thirdly, the claim raised a variety of issues which were argued at trial, but which were not ruled upon because no award was in fact made.

Two may be of interest to charities in defending a claim under the 1975 Act:-

(1) The first is the question of whether a claimant who is on the verge of bankruptcy can properly claim for a sum to clear off his or her debts. If the claimant can, then the creditors are piggy-backing on the claim in a way which may not be permitted by the 1975 Act. It is arguable that in such a case, any provision should be made by way of the creation of an asset protection trust for the primary benefit of the claimant, and should not include any discharge of debts. If a claimant is subject to an IVA (as was Hetty at the time of the trial in the Baynes case), the success of which is dependent on the success of the 1975 Act claim, then the claim and therefore the IVA will have succeeded even though the debts are not provided for, and the creditors' claims will fall away. There is authority in support of such approach: Re Abram [1996] 2 FLR 379; and

(2) The second is the question of the appropriate manner of providing for an elderly applicant (i.e. Margot in the Baynes case). The life expectancy of an elderly applicant is very unpredictable, and there is a high risk associated with any estimate given. One approach that can be adopted is to give the elderly person a life interest in a fund (with power to apply capital in the case of need), with the remainder interest going to the Will residuary beneficiaries on the death of the life tenant. This structure can be tax efficient where the residuary beneficiaries are charities.

Fourthly and finally, the claim raised the issue of which part of the estate should bear the cost of any award. It was argued on behalf of Margot that any award made in favour of Hetty should be borne by the Landmark Trust and not by residue. Whilst an award will usually be borne by residue, this is not necessarily so, especially where there are legacies of substantial value. Where a charity is a residuary beneficiary of an estate subject to a claim under the 1975 Act, it should consider contending for any award to be borne out of the value of the legacies as opposed to residue on the basis that the charity ought to be viewed as a beneficiary with needs, having regard to the worthy causes which it represents.

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