

**FOR** LEGAL

Learning without limits

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## Claims against estates

What needs to be considered when there are charity beneficiaries and how charities deal with claims



# Agenda

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- › Provide an overview of:
  - › Charity trustee decision making.
  - › Common claims faced by charities.
  - › Costs in probate claims.
  - › Key legal, ethical and practical considerations.
  
- › Give tips for charities to adopt when bringing or responding to claims.



## Key Issues to consider

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- › The need for the charity to maximise the legacies left to it by the donor.
- › How to deal with the threat of litigation.
- › The costs of taking any action.
- › The risk of negative publicity.



# Charity Trustee Decision Making

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**Any party to litigation, whether charitable or not, must consider the potential risks against the benefits then reach a decision as to whether or not to engage in the litigation.**

## **Risks:**

- › The cost of representation.
- › The risk of an adverse costs order.
- › The time and energy taken up by the process.
- › The possibility of adverse publicity.

# Charity Trustee Decision Making

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## Benefits:

- › The value of the relief sought.
- › The benefit of preventing an adverse claims from succeeding.
- › The negotiating leverage provided by a robust claim to a defence.

# Charity Trustee Decision Making

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- › All charity trustees owe fiduciary duties to act in the best interests of the charity.
- › Duty to protect – and where necessary recover – assets of the charity.
- › Expected to exercise due care and skill.
- › Statutory duty to exercise such care and skill as is reasonable in the circumstances.

# Charity Trustee Decision Making

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- › Charity trustees will often seek legal advice as to the merits of the case and prospects of success.
- › Trustees will need to examine not only the financial aspects but also the wider potential impact of litigation on the charity.
- › Adverse publicity could result from litigation which affects the charity's ability to carry out its functions or raise funds.



# Review of Decision Making

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- › Charity trustees will need to demonstrate and record in relation to any significant decision, that:
  - › They have acted within their powers.
  - › they have acted in good faith.
  - › they have acted solely in the best interests of the charity.
  - › they were sufficiently well informed.
  - › they took account of all relevant factors.





# Review of Decision Making

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- › they ignored irrelevant factors.
- › they managed any conflict of interests.
- › the decisions made were within the range of decisions that a reasonable trustee body could make.

# Review of Decision Making

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- › When deciding whether to engage in litigation, charitable trustees should consider:
  - › Their duty to secure, protect and if necessary, recover a charity's assets.
  - › their duty, when making decisions as charity trustees, to act exclusively in the best interests of the charity.
  - › whether they have obtained suitably specialist legal advice on the potential litigation.
  - › the prospect of success or failure.
  - › the impact of success or failure on the charity.
  - › whether the intended actions are proportionate in the circumstances.

# Review of Decision Making

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- › Whether it is necessary or appropriate to ask for the Charity Commission's consent or advice.
- › The possible costs of the process.
- › Whether all other avenues for resolving the issue have been explored.
- › Whether the decision as to whether to become involved in litigation or not can be justified if the matter becomes public knowledge; and
- › Whether the charity has sufficient assets to meet the potential costs.



# Common types of claims

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## Common claims:

**A relatively low proportion of Will and probate disputes referred to solicitors are actually litigated.**

## Claims:

- › Disputes essentially arise as to where the deceased's assets should go.
- › Many claims involve disputes about the validity of a Will, often on grounds of lack of testamentary capacity.

# Common types of claims

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- › Other disputes often stem from suspicions and estrangements which arise between different branches of the family.
- › There has been an increase in claims under the Inheritance (Provision for Family and Dependants) Act 1975.



# The Inheritance (Provision for Family and Dependents) Act 1975 ('the Inheritance Act')

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## Who can bring a claim?

Section 1 lists the people who can bring a claim for reasonable financial provision.

## Eligible claimants:

- › The spouse or civil partner of the deceased.
- › A former spouse or civil partner of the deceased who has not remarried or entered into a further civil partnership.

# The Inheritance Act

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- › Any person who was living with the deceased as their spouse or civil partner in the same “household” for the two years immediately prior to the death.
- › The deceased’s “child”.
- › Any person who was being “maintained” by the deceased immediately before their death, whether wholly or partly.



# The Inheritance Act

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## What is reasonable financial provision?

Section 1(2)(a), (aa) and (b)

## What can an eligible claimant claim?

- › Spouses and civil partners enjoy a higher standard of award.
- › All other claimants can claim for *“such financial provision as is reasonable in all the circumstances of the case for them to receive for their maintenance”*.



# The Inheritance Act

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- › “*Maintenance*” is not defined in the Inheritance Act.
- › Broadly it means: an amount sufficient to provide for a person’s needs where their own financial circumstances mean they are unable to do so themselves.

# The section 3 factors

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**Factors the court takes into account when determining what, if any, award to make (section 3 of the Act).**

- › The financial resources and financial needs which the person(s) seeking financial provision has or is likely to have in the foreseeable future.
- › The financial resources and financial needs which any beneficiary of the estate has or is likely to have in the foreseeable future.

## The section 3 factors

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- › Any obligations and responsibilities which the deceased had towards any person seeking financial provision or any beneficiary.
- › The size and nature of the net estate.
- › Any physical or mental disability of any person seeking financial provision or any beneficiary; and
- › Any other matter.



# Disposing of claims under the Act

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- › Most claims settle before trial, either at mediation or through correspondence.
- › Those that do get to trial can have persuasive authority for courts in future cases as well as parties bringing and defending claims.
- › Most claims under the Act will be suitable for early mediation and/or settlement via ADR.

# Time limits

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- › Claims must be issued within 6 months of the date of the grant of representation. (s.4)
- › The court has discretion to allow claims outside of this time limit.
- › Factors in determining whether the court will allow a claim to be brought outside the usual time limit:
  - › Merits of the claim; and
  - › Reason for the delay.

## A note on tax

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- › A will or intestacy can be varied for tax purposes within 2 years of death by way of a deed of variation.
- › Section 19 of the Act provides that any order for financial provision is deemed to have effect for tax purposes as if it was made on the deceased's death.

# Will challenges – testamentary capacity

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In order for a Will to be valid, the testator must have the **requisite mental capacity to make a Will**, know and approve the contents of the Will and have made the Will voluntarily.

- › Testamentary capacity – a person’s mental capacity to make or alter a Will.
- › *Banks v Goodfellow* [1871] LR 5 WB 549.
- › The test:
  - › Did the testator understand the nature of the act and its effects?

# Will challenges – testamentary capacity

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- › Did the testator understand the extent of the property of which they were disposing?
- › Was the testator able to comprehend and appreciate the claims to which he ought to give effect?
- › Was the testator's mind affected by any disorder or delusion which was active in bringing about a disposal which the testator would not otherwise have made?





# Will challenges – testamentary capacity

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- › This question can be broken down into two parts:
  - › Did the testator suffer from a mental disorder or delusion?
  - › If so, did that mental disorder affect his decision making in respect of the Will?

# Will challenges – testamentary capacity

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## › **Case law:**

- › *Kostic v Chaplin* [2007] EWHC 2298 (Ch)
- › *Viva! And Vegetarian Society v Scott* [2014] WTLR 525
- › *Lloyd v Jones* [2016] EWHC 1308 (Ch)
- › *Burns v Burns* [2016] EWCA CIV 37

# Will challenges – undue influence

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In order for a Will to be valid, the testator must have the requisite mental capacity to make a Will, know and approve the contents of the Will and **have made the Will voluntarily.**

- › Undue influence – a situation in which a person has been coerced into making or amending a Will.
- › The level of improper pressure or coercion must be to such an extent that the individual's free will is overborne.
- › The burden falls on the person alleging undue influence to prove it.

# Will challenges – undue influence

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## › **Case law:**

- › *Edwards v Edwards* [2007] EWHC 1119 (Ch)
- › *Schrader v Schrader* [2013] EWHC 466 (Ch)
- › *Schomberg v Taylor* [2013] EWHC 2269 (Ch)
- › *Re Chin* [2019] EWHC 523 (Ch)

# Will challenges – want of knowledge and approval

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In order for a Will to be valid, the testator must have the requisite mental capacity to make a Will, **know and approve the contents of the Will** and have made the Will voluntarily.

- › Want of knowledge and approval – can the Will be said to reflect the testator's testamentary intentions?
- › The test – for a testator to have the requisite 'knowledge and approval' they must understand:
  - › What was in the Will when they signed it; and

# Will challenges – want of knowledge and approval

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- › What the effect of the provisions of the Will would be.
- › Presumption that the testator had knowledge and approval where the formalities of s.9 of the Wills Act 1937 have been followed.
- › BUT: where there is a challenge to the validity of the Will based on ‘suspicious circumstances’ surrounding the making of the Will, the burden falls to the person seeking to propound the Will to prove the testator did know and approve its contents.

# Will challenges – want of knowledge and approval

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## › **Suspicious circumstances:**

- › The testator is too ill to understand the contents of their Will.
- › The Will is not read to the testator or read out to them.
- › A draft Will was not provided to the testator prior to its execution.
- › Homemade Wills.
- › The main beneficiary of a Will took an active role in its procurement.
- › The testator was behaving irrationally or ‘out of character’ when the Will was made.



# Will challenges – want of knowledge and approval

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## › **Case law:**

- › *Barry v Butlin* [1838] UKPC 22
- › *Buckenham v Dickenson* [2000] WTLR 1083
- › *Gill v Woodall* [2010] EWCA CIV 1430
- › *Hawes v Burgess* [2013] EWCA CIV 74





# Costs

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## The costs position in probate claims is often misunderstood

The most common misconception is that the costs of the litigation will be paid by the estate – this is incorrect. **Costs follow the event.**

- › An unsuccessful litigant can expect to pay some or all of the successful party's costs subject to the court's discretion.
- › Conduct:
  - › Before and during the claim.
  - › Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue.

# Costs

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- › The way a party has pursued or defended a case.
- › Whether a claimant who has succeeded in the claim, exaggerated their claim.

# Costs – exceptions to the general rule

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- › The testator or the residuary beneficiaries have been the cause of the litigation.
- › The circumstances lead reasonably to an investigation of the validity of the Will.
- › Notice to cross examine the witnesses (CPR 57.7)
- › The court may penalise a party in costs if they unsuccessfully plead undue influence.
- › CFA's in Inheritance Act claims.
- › Who else can be ordered to pay?

# Key legal, ethical and practical considerations

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**Charities have specific legal, ethical and practical considerations to take into account when making decisions before, during and after a dispute has arisen.**

- › **Legal considerations:**
  - › Are the steps being taken in keeping with the charity's and its trustees' duties and responsibilities?

# Key legal, ethical and practical considerations

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- › Is the charity's conduct in compliance with the Charities Act and guidance from the Charity Commission and the Charity Law Association?
- › Are the trustees acting in the charity's best interests and taking proportionate steps in order to protect those interests?
- › Can the trustees demonstrate that they have complied with guidance?
- › Does the charity require the Charity Commission's consent to take any next steps?



# Key legal, ethical and practical considerations

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## › Ethical considerations:

- › Does the charity's conduct of the litigation align with the requirement of charities to *"proactively champion ethical behaviour and reflect and apply their charitable values in any activity they undertake, in addition to meeting their legal and regulatory requirements"*?
- › Is the charity's position likely to encourage or discourage donors?
- › Is the charity able (and are they morally obliged) to waive their right to receive income or make an ex gratia payment?

# Key legal, ethical and practical considerations

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- › To what extent does a charity wish to be perceived as either supporting or resisting an invasion of testamentary freedom, particularly where, e.g., there is a claimant who might ordinarily support or benefit from a charity with a similar mission statement to the opposing charity?



# Key legal, ethical and practical considerations

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## › **Practical considerations:**

- › How aggressive will a charity be perceived as a party to the litigation?
- › Disputes come at great expense, both from a financial and reputational perspective.
- › What is the charity's approach to risk?
- › What are the charity's prospects of success and how willing is the charity to take a chance on proceeding to trial and losing?



# Key legal, ethical and practical considerations

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- › Who are the other parties to the dispute?
- › How will relationships, potentially with other charities, be affected?
- › Who will be the point of contact dealing with the dispute within a charity?

# Conclusion

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- › The effective management of disputes should enable charities to maximise their income and/or entitlement, whilst upholding the core values of the charity and its followers.
- › It is crucial that the exercise of considering these issues is undertaken as early as possible to mitigate risk and avoid any unwelcome consequences of the charity engaging in a dispute.
- › Probate litigation should be pursued and defended with the same degree of caution as all litigation.
- › Probate disputes are often suited to early mediation.



# Tips for the early resolution of probate claims

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- › Join in on instructions with other charities, to share legal costs.
- › Ask your legal advisors to carry out an early risk assessment of the legal merits of the claim.
- › Consider ADR, and/or 'without prejudice' offers to settle, in order to resolve disputes at an early stage, and at the least cost to preserve the overall value of the charitable gift.



## Get in touch

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**To ask a question on a confidential basis, or for more information about how we might help you, please email us at:**

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