

Location, location - move to Gambia defeats Will challenge

19 MAY 2016

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Claims for financial provision are probably the most common challenges to Wills post-death.

Financial provision claims are brought under the Inheritance (Provision for Family and Dependents) Act 1975 (known as the 1975 Act). Surviving spouses in particular can secure large awards.

However, the deceased must have been domiciled in England and Wales at the time of death for anyone can bring a 1975 Act claim.

Thus the immigrant who has come to England and Wales but who has not formed the intention of remaining here, remains domiciled in their country of origin and no-one may bring a 1975 claim for provision against his estate. Meanwhile, the English emigrant who left many years ago but intends one day to return to the motherland, remains domiciled in England and Wales (and a 1975 Act claim remains a possibility).

The condition is sometimes overlooked, particularly because domicile is not necessarily the same as place of residence or nationality. Given it is estimated that 5 million Britons live abroad permanently or temporarily, and an estimated 75 million UK residents were born outside the United Kingdom (2011 census), it is domicile is increasingly relevant in disputes. Note too that a Scottish domicile means no 1975 Act claim.

A recent High Court decision, where a widow got nothing in her husband's will, demonstrates the impact of the condition. The Judge decided that Michael Mitchell was domiciled in The Gambia when he died. That meant that his widow could not claim financial provision, even though she inherits nothing under the Will.

Background

Mr Mitchell was a successful businessman. He had been married with two daughters but subsequently divorced. He moved to The Gambia in 1994, by which point he was 'practically retired' where he built a 'rather splendid' home. He met Haddy, a Gambian national, in 1999 and in 2000 they married. They returned to the UK for the birth of their daughter Jennifer.

Malcolm and Haddy then returned to The Gambia until February 2002, but travelled to England twice later in that year. By 2003, their marriage was showing some strain. One of the reasons was that Haddy wanted to live in England and Malcolm wanted to live in The Gambia. By 2004 Malcolm and Jennifer were in The Gambia but Haddy remained in England.

On 5 May 2006, Malcolm made a Will in England naming Mr Farmer, his accountant and friend, and Jayne Mitchell, his eldest daughter, as executors and trustees. The Will made a number of small pecuniary legacies and left the residuary estate equally between Jayne, his second daughter, and Jennifer. The Will did not make any provision for Haddy.

Malcolm died on 28 September 2011 in The Gambia. Haddy brought proceedings under the 1975 Act.

Delay

The case didn't get to Court until more than four years after Malcolm's death. Contributing factors to the delay reportedly included slow case management, change in time estimate leading to loss of the original trial date, and an unsuccessful application by Malcom's adult daughters to remove Jennifer's litigation friend.

Decision

The Court held that Malcolm had intended to abandon his domicile of origin in England and so had become domiciled by choice in The Gambia. That means Haddy has no right to redress under the 1975 Act.

There was a separate issue which was never decided upon because it involved Gambian law. Malcolm had filed divorce papers in The Gambia. These were never served on Haddy and were found hidden under his bed after his death. His friends and family apparently knew about the divorce, but Haddy did not. Malcolm had apparently refrained from serving the documents on Haddy for fear of Haddy bringing proceedings to take Jennifer back to England.

Domicile of origin is usually difficult to shake off. So the Judge had to be convinced that Malcolm really had abandoned his English domicile of origin and acquired a domicile of choice in The Gambia.

Malcolm had never acquired Gambian citizenship but he had annually applied for a residence permit. This, in other circumstances or before another Judge, might have been persuasive evidence that Malcolm had not made that final decision to acquire a new domicile. However, Malcolm had given clear indications to family and friends of his desire to spend the rest of his life in The Gambia. For example, he said to his sister, *'Why on earth would I want to live anywhere else?'* He also had picked a plot of land in The Gambia in which he hoped to be buried.

The Judge dismissed the argument that Malcolm's business interests and assets in England and the fact that he had an English Will and English executors meant that his ties to England were never wholly severed. The Judge held that they did show some enduring connection but the ties were less strong than those to The Gambia. For example, he had a flat in England for 'temporary' use but had a 'rather splendid home' in The Gambia.

Tellingly, the Judge described *'the marriage [as] not universally harmonious'*.

The Judge concluded that there were insufficient indicators that Malcolm had an intention of returning to England on a permanent basis and that he had acquired a domicile of choice in The Gambia.

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