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Today's Wills & Probate

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A Close Shave for a Financial Advisor, and a Haircut for a Solicitor

Richard Manyon, 27th May 2016

Mrs Shemwell died unexpectedly at the age of 86 in June 2012. She had no surviving close relatives, and left her estate to a combination of distant relatives, friends and charities. She was a relatively wealthy woman with an estate worth c.£2 million. The recent case concerning that estate, Herring and Anor v Shorts Financial Services LLP [2016] EW Misc B12, contains important lessons for professionals involved in estate planning.

In the years prior to her death, Mrs Shemwell established various trusts. In 2005 she settled £215,000 in favour of her late husband's business partner, Mr Terry. In 2006 the settled a further £150,000 in favour of Mr Terry.

She later, in 2011, came to settle further sums in favour of her great-niece and nephew, Claire Hartley and Timothy Herring ("the Claimants"). The trusts were set up by her long time financial advisor, Mr Sully of Shorts Financial Services LLP ("the Defendant").

Because of the earlier trusts, in 2011 Mrs Shemwell only had £175,000 left in her nil rate band . Had she settled more than this in 2011, she would have had to pay an immediate 20% inheritance tax charge, which Mrs Shemwell was unwilling to do.

Mr Sully therefore advised a discretionary trust of £175,000 ("the Discretionary Trust") for the benefit of only the Claimants. He further advised that a loan trust ("the Loan Trust") could be set up whereby the capital in the trust was owed by the trustees to Mrs Shemwell (and subsequently her estate) but any uplift in value could be held for the Claimants. Mrs Shemwell proceeded to set up this trust with an amount of £125,000, and the result of this was that the capital amount in the trust formed part of Mrs Shemwell's estate when she died, and was not held for the Claimants.

Upon Mrs Shemwell's death, Mr Sully informed the Claimants, and advised that they were the beneficiaries of both the Discretionary Trust and the Loan Trust. This advice was wrong. The Claimants did stand to benefit from the Discretionary Trust and from a legacy of £54,000 each under Mrs Shemwell's will, but the capital in the Loan Trust reverted to her estate.

Unsurprisingly the Claimants were unimpressed, and proceedings commenced against the Defendant.

To begin with there was more than one defendant to the proceedings because Mrs Shemwell's solicitors, BRM, were added as a party. The events surrounding the establishment of the 2011 trusts were critical, and particularly a meeting involving Mrs Shemwell, Mr Sully and Mr Whitehead of BRM of 21 October 2011 ("the Meeting"). Prior to this, Mr Sully had advised Mrs Shemwell in relation to the proposed trusts in person and in writing.

By the time of the Meeting, the 2011 trusts had been established. Mr Sully thought that he was attending the meeting simply to provide an up to date valuation of the trust assets. In the event, he was only at the

Meeting for around 5-10 minutes before being asked to leave so that Mrs Shemwell could discuss her new will with Mr Whitehead. Before leaving, Mr Sully left a rough note relating to the valuation of various trust assets with Mr Whitehead. He did not keep an attendance note of the Meeting.

Mr Whitehead understood, either from Mr Sully or from Mrs Shemwell, that on Mrs Shemwell's death the capital in the Loan Trust would fall outside her estate and pass to the Claimants. He did not check this with Mr Sully, and drafted Mrs Shemwell's will on this basis. It was Mrs Shemwell's intention that the Claimants should receive around £400,000 from her in total, but when she died this did not take place because the capital in the Loan Trust reverted to the estate therefore the Claimants received only c.£290,000.

The Claimants settled the claim against BRM prior to trial, but argued before the Leeds County Court that the Defendant had caused them loss. Their case was effectively that Mr Sully had not understood the nature of the Loan Trust, that he had believed that the monies in that trust would fall outside Mrs Shemwell's estate and pass to the Claimants on Mrs Shemwell's death, that he had advised Mrs Shemwell of this at the Meeting, and that the Defendant was liable directly to the Claimants for the loss suffered because Mr Sully was part of the will-making process.

The Court rejected this claim. On the basis of documents and letters prepared prior to the Meeting, it was found that Mr Sully did understand the nature of the Loan Trust, and that he advised Mrs Shemwell appropriately. The Court further found that the wrong advice Mr Sully had given the Claimants in 2012 was simply because he had not checked his records and had forgotten the relevant details as regards the Loan Trust.

The Court went out of its way to note that it was hard to avoid the conclusion that BRM had been negligent. They had not made enquiries to establish whether the Loan Trust monies would pass to the Claimants and had simply assumed this when they drafted Mrs Shemwell's will on the basis of inadequate information. It was negligent to draft the will on the basis of such poor fact-gathering. This did not however inform the liability of the Defendant.

The case raises practice points in a number of areas. For example:

1. For solicitors and others involved in the drafting of wills, it is critical to establish both the testator's intentions and the factual matrix within which those intentions exist. It is not safe to make assumptions about structures set up by the tetator. Details are required in every case. Problems seem particularly likely when different people or organisations are involved in one testator's affairs;

2. For financial advisors dealing with inheritance related matters, it is important to keep attendance notes of even apparently inconsequential meetings. If Mr Sully had had an attendance note of the Meeting stating that he had properly explained the Loan Trust to Mrs Shemwell and Mr Whitehead, a trial might never have taken place;

3. For litigators, the case is an example of how difficult it can be to settle with one defendant in a multi-party litigation. Details of the settlement with BRM are not available, but their absence as a defendant at trial appears to have laid bare the weaknesses in the claim against the Defendant and exposed the Claimants to a possible costs Order.