



Should a Child Inherit Twice?

Natasha Carolan

The Presumption Against Double Portions – Kloosman v Ayleen & Others (2013) EWHC 435

The recent case of *Kloosman v Ayleen* has revisited the law on double portions, this article deals with the current law and offers practical advice for practitioners.

What is a Portion?

The case of *Vaux (1938) CH581* established that, “*if a testator by his will gives a portion to a child and then gives a portion to that child in his lifetime, the will portion is in whole or in part adeemed (revoked) because he is presumed in each case to be making the gift in discharge of the same natural obligation.*”

The term ‘portion’ was defined in the case of *Re Cameron (1999) CH386* as, “*something which is given to the parent to establish the child in life or to make what is called provision for him.*”

A portion can only take place in a parent and child relationship. However, do keep in mind that in the case of *Re Cameron* the testator paid his grandchild’s school fees and that was held to be a portion to the testator’s child. Any gift that benefits the testator’s child could be deemed as a portion.

What gifts will be deemed a Portion?

Re Cameron established that, “*because the notional part of the portion is so loose the courts have been able to be flexible in applying the description to various gifts.*” The gift does not just have to be a gift of money to be deemed a portion it can also be other assets, such as company shares or property. The courts have also stated that the amount does not have to be a ‘like for like’ amount.

How can you show a Portion has taken place?

The relevant question is, ‘was it the donor’s intention that the gift is a portion?’

The case of *Re Eardley’s Will (1920) 1CH397* established that the donor’s intention does not need to be expressed; it may be, “*irresistibly drawn from all the circumstances of the case.*”

Although it would be best for the testator's intention as to the gift to be set out in a will or a letter, if this written intention is not present a portion can be rebutted by way of other evidence such as witnesses.

A portion can take place whether or not the will is made before or after the gift is made.

The Facts of Kloosman v Aylen & Others

The testator, Mr Richard Frost died on 4 March 2008 at the age of 84.

He had three children, Linda Aylen, Susan Frost and Andrew Frost.

He made a will on 26 September 2007 leaving his estate on trust as to one-third for Linda Aylen, one-third for Susan Frost and one-third for Andrew Frost and his children in the following split, one-sixth for Andrew Frost and one-sixth for his two children, Robert Frost and Tracey Frost.

Before making his will, Mr Frost owned a property and shortly afterwards had sold the property for almost £350,000.

On 2 November 2007 Mr Frost made two cash gifts of £100,000 to each of his daughters.

The court had to determine whether or not the inter vivos gifts of £100,000 were portions.

The court looked at the character of Mr Frost and the circumstances surrounding the gifts.

The court placed considerable weight upon Mr Frost's ignorance of the value of his estate at the time of making the will and concluded that Mr Frost could not comprehend that his property would sell for £350,000.

As to the timing of the gifts, the court placed considerable prominence on the fact that Mr Frost had received considerable financial and moral support from his daughters.

On the particular facts of this case, the gifts were found not to have been intended as portions and it was not therefore necessary for the court to look at the second step of applying the presumption.

Practical advice

- It is important that a testator understands the extent of their estate and what their assets are worth when drafting their will.
- It is important to check whether any lifetime gifts have been, or will be made and to ensure that the testator's intention as to whether or not these gifts were made instead of, or as well as the gift in the will is clearly set out.
- Whenever you are asked to handle a substantial lifetime gift it should act as a reminder to ask your client if they have a will and if that gift is intended as an on account gift. The same questions should be asked in relation to any grandchildren or to any third party linked to the child of the testator.

- Care should also be taken when administering an estate to check whether or not any significant lifetime gifts were made, and whether or not they were intended to be a portion

Natasha Carolan
Child & Child
4 Grosvenor Place
London SW1X 7HJ
Direct line: 020 7201 3577
Email: natashacarolan@childandchild.co.uk

The information in this article is intended for general guidance only. It provides useful information in a concise form and is not a substitute for obtaining legal advice. If you would like advice specific to your circumstances please contact us.