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Testamentary Freedom, Family Obligation and the *Ilott* Legacy

Ilott v The Blue Cross and Others [2017] UKSC 17

Wills; Family Provision; Adult Children; Testamentary Freedom; Charities

Introduction

In March 2017, the Supreme Court handed down its judgment in *Ilott v The Blue Cross and Others*,¹ following a protracted and well-publicised legal dispute. The case involved a claim under the Inheritance (Provision for Family and Dependants) Act 1975 by an adult daughter who had been excluded from her dead mother's will, which left the entire estate to charity.² As is well-known, the 1975 Act allows specified relatives and dependants of the deceased to challenge a will (or intestacy distribution) if it failed to make 'reasonable financial provision' for that particular individual- defined as what is needed for the applicant's maintenance in all applications,³ except those brought by a surviving spouse or civil partner.⁴ When approaching individual applications, English courts have traditionally applied a two stage test: (i) did the deceased's will (or intestacy) fail to make reasonable financial provision for this applicant (the threshold test) and (ii) if so, what order should be made (the issue of quantum)? The jurisdiction is a discretionary one, though judges must evaluate a range of factors listed in s 3 of the Act.⁵

This is the first time that a family provision claim has reached the highest court in the UK, and the judgment makes interesting reading for two reasons. First, it revisits one of the most disputed claims: those by an 'independent' adult child.⁶ Secondly, in addressing the specific issues raised in the case, the Supreme Court also looked at the operation of the 1975 Act more generally.

¹ [2017] UKSC 17; [2017] 2 WLR 979. The case was formerly listed as *Ilott v Mitson*.

² See generally G Douglas, "Family Provision and Family Practices-The Discretionary Regime of the Inheritance Act of England and Wales" (2014) 4 *Oñati Socio-Legal Series*.

³ 1975 Act, s 1(2)(b).

⁴ A surviving spouse or civil partner is entitled to such provision as is 'reasonable in the circumstances'- 1975 Act, s 1(2)(a).

⁵ General factors (listed in s 3(1)) apply to all family provision claims, and include things like the financial resources and future needs of the applicant and any beneficiaries of the estate, the size of the estate, and any other relevant matter (including the conduct of the applicant or any other person). Specific factors also apply to each category of applicant and are listed in ss 3(2)-(4).

⁶ In other words, an adult son or daughter who is economically self-sufficient (or, at least, capable of earning their own living), and who was not financially dependent on a deceased parent before death (even if in financial need). For an analysis of the relevant case law up to this point, see H Conway, "Do Parents Really Know Best?: Family Provision and The Adult Child" in W Barr (ed), *Modern Studies in Property Law, Volume 8* (Hart Publishing, 2015) pp 117-134.

Facts and (lengthy) appellate history

The facts of *Ilott* are well-known. Melita Jackson had been widowed in 1960, while pregnant with her only child, Heather. In 1978 and aged 17, Heather left home to live with a man her mother disapproved of. This caused a rift between mother and daughter, and the pair never reconciled, despite several abortive attempts. In the interim, the daughter married her partner and had five children with him; Heather Ilott (as she now was) subsequently chose not to work in order to be a stay-at-home mother. Having executed her final will in April 2002 and drafted a statement explaining her decision to exclude her only child, Melita Jackson informed her daughter of this in a letter; the daughter wrote back, accepting that she would inherit nothing.⁷ When the mother died in 2004, she left a net estate of £486,000 to three animal charities (The Blue Cross, the RSPB and the RSPCA) that she had no lifetime connection to, and made no provision for her only child who was then aged 44, had not worked since the birth of her first child in 1983 and was living in a 3-bedroom property rented from a Housing Association. The daughter's husband worked part-time, and the family were dependent on state benefits to meet basic living expenses.

In 2007, District Judge Million ruled that the deceased had not made 'reasonable financial provision' for her daughter under the 1975 Act, and awarded Heather £50,000 from the estate. Dissatisfied with the amount, the daughter appealed; however, Eleanor King J (as she then was) set aside the decision on the threshold point, citing no failure to make reasonable financial provision.⁸ The daughter then appealed to the Court of Appeal, which ruled in her favour in 2011 and remitted her appeal on quantification back to the High Court.⁹ Parker J upheld the District Judge's ruling in March 2014.¹⁰ The daughter also appealed that decision to the Court of Appeal, which raised the amount to £143,000 with an option to draw upon a further £20,000¹¹- effectively tripling the original sum, and triggering a final appeal on quantum to the Supreme Court.

The lump sum awarded by the Court of Appeal was to allow the daughter to buy the house that she and her family lived in, while the smaller amount was additional income intended to supplement her state benefits. In overturning the District Judge's decision on quantum, the Court of Appeal claimed that he had committed two fundamental errors of principle. The first was in limiting his award to take account of the lengthy estrangement

⁷ For some reason, this correspondence did not receive more attention in the various rulings, though Lord Kerr did raise the point with counsel for the charities at the Supreme Court hearing.

⁸ [2009] EWHC 3114 (Fam); [2010] 1 FLR 1613.

⁹ [2011] EWCA Civ 346; [2012] 2 FLR 170.

¹⁰ [2014] EWHC 542 (Fam); [2015] 1 FLR 291.

¹¹[2015] EWCA 797; [2016] 1 All ER 932.

between the parties and the daughter's lack of expectation of inheriting from her mother, but without indicating what award he would have made otherwise; the second was reaching a figure of £50,000 without considering the impact on the daughter's benefits.

The Supreme Court ruling

In a unanimous ruling, the seven Supreme Court judges held that the District Judge had not made the errors alleged by the Court of Appeal. Lord Hughes (delivering the judgment of the court) began by setting out the key features and provisions of the 1975 Act, analysing the twin precepts of 'reasonable financial provision' and the concept of 'maintenance' in some detail- though more on this later.¹² Turning to proceedings in the present case and the first objection raised by the Court of Appeal, Lord Hughes emphatically rejected the notion that the District Judge should have explained what award might have been made had he not taken both the estrangement and lack of expectation into account. According to his Lordship:

The Act requires a single assessment by the judge of what reasonable financial provision should be made in all the circumstances of the case. It does not require the judge to fix some hypothetical standard of reasonable provision and then either add to it, or discount from it, by percentage points or otherwise, for variable factors.¹³

Lord Hughes also stressed that the District Judge had not erred in taking account of the relationship between the applicant and the deceased, and- having analysed all of the factors listed in s 3 of the 1975 Act as he was required to do- was entitled to view the lengthy estrangement as "one of the two dominant factors in this case"¹⁴ (the other being the daughter's straitened financial position). In short, the District Judge was "perfectly entitled" to conclude that there had been a failure to make reasonable financial provision, but that "what reasonable financial provision would be was coloured by the nature of the relationship between mother and daughter".¹⁵

Turning to the second suggested error, the Court of Appeal had criticised the District Judge for making an order that was of little or no benefit to the daughter, since a £50,000 lump sum would push her savings above the £16,000 eligibility threshold for

¹² See Part III.

¹³ [2017] UKSC 17 at [34]. This must be correct; there is little merit in asking judges to set a base figure which ignores things like family estrangements (or lack of inheritance expectation), before adjusting that figure to reflect the exact same reality. Such an artificial exercise has never been suggested in the case law on the 1975 Act.

¹⁴ [2017] UKSC 17 at [35].

¹⁵ [2017] UKSC 17 at [35].

Housing Benefit and Council Tax Benefit which were part of the family's net annual income.¹⁶ Again, this criticism was unfounded: the District Judge had specifically addressed the impact on benefits twice in his judgment, and settled on an award of £50,000 which would allow the daughter to purchase essential household items (as part of her claim, Heather Ilott had listed various things that she needed to replace). Such items were needed for the "maintenance of daily living"¹⁷ and the substantial outlay to purchase them would minimise the impact on means-tested benefits (a large amount of the £50,000 would be spent, leaving savings of less than or close to the £16,000 limit). In short, it was wrong to suggest that the District Judge's award was of little value to the daughter.

Neither of the two alleged errors having occurred, the Supreme Court set aside the order made by the Court of Appeal and restored the order of the District Judge.

Independent adult children and family provision claims more generally

It is hard to disagree with the Supreme Court's assessment of the judgment below and the reasons for overturning it. Where it exists, family estrangement is part of the factual matrix and something that courts should take into account;¹⁸ the District Judge was entitled to do so in the present case, where the rift was so longstanding. Receipt of state benefits was another factor for courts to consider;¹⁹ having done so here, the District Judge was entitled to reach a less generous outcome than the Court of Appeal, and had not erred in principle.

Had these issues been the sole focus of the judgment, those of us with an interest in the area would have felt short-changed after a decade of litigation and numerous appeals.²⁰ However, in considering the appeal, the Supreme Court in *Ilott* undertook an extensive review of the family provision jurisdiction and its application, both in adult child cases and more generally. These are the more pertinent aspects of the judgment, and are likely to influence future claims under the Act.

¹⁶ One of the key reasons why the Court of Appeal structured its award- and in particular, the additional £20,000- in the way that it did.

¹⁷ [2017] UKSC 17 at [41].

¹⁸ Though there may be a danger here of courts taking conduct into account- which they generally avoid in family law cases- and via the 'back door'.

¹⁹ The legislation instructs judges to look at an applicant's "financial resources and financial needs"- 1975 Act, s 3(1)(a).

²⁰ Criticised by the Supreme Court, with Lord Hughes describing the case as "an example of much to be regretted prolongation, and presumably expensive prolongation, of the forensic process"- [2017] UKSC 17 at [24].

Renewed emphasis on testamentary freedom

A major criticism of the Court of Appeal judgment- and one that was seized upon by the media- was the seemingly blatant disregard for the mother's wishes.²¹ Testamentary freedom allows individuals to dispose of their property on death as they see fit, even if this means disinheriting their family, and Melita Jackson had made her reasons for excluding her daughter perfectly clear (regardless of whether or not one agrees with them). While acknowledging this fact, the Court of Appeal attached little weight to the mother's wishes. In sharp contrast, the Supreme Court took the opportunity in *Ilott* to reassert the importance of testamentary freedom and to emphasise that the deceased's wishes should be given significant weight when a claimant is challenging the distributive scheme of a validity executed will. The position is apparent from the opening line of Lord Hughes' judgment ("English law recognises the freedom of individuals to dispose of their assets by will...in whatever manner they wish");²² later, he remarked that "the order under appeal would give little if any weight...to the testator's very clear wishes".²³

This aspect of the judgment is likely to be welcomed by those²⁴ who felt that courts were (at best) paying lip service or (at worst) simply ignoring the deceased's wishes in family provision cases. Of course, testamentary freedom is not absolute because it is qualified by the 1975 Act; however, will-makers (and lawyers advising them) should be more confident that personal choices will be respected.

Assessing 'reasonable financial provision'

The concept of reasonable financial provision underpins the 1975 Act, since an applicant can only succeed if the deceased's will (or intestacy) failed in this respect. Concerns have been raised that judges sometimes apply the wrong test, in asking whether the deceased had acted 'unreasonably' in disinheriting an adult child (or other eligible applicant).²⁵ Addressing the issue in *Ilott*, Lord Hughes noted that reasonable financial provision (whether limited to maintenance, or not) denotes an "objective standard of financial provision, to be determined by the court" and that the 1975 Act "does not say that the court may make an order when it judges that the deceased acted unreasonably".²⁶ The reasonableness (or otherwise) of the deceased's actions could be

²¹ See for example, "Your Will Can be Ignored Say Judges", *The Telegraph* (27 July 2015) available at <http://www.telegraph.co.uk/news/uknews/law-and-order/11766651/Your-will-can-be-ignored-say-judges.html> (accessed May 2017).

²² [2017] UKSC 17 at [1]. In her supplementary judgment, Lady Hale described testamentary freedom as "the default position in the law of England and Wales, subject to the courts' limited discretionary powers"- [2017] UKSC 17 at [52].

²³ [2017] UKSC 17 at [46].

²⁴ Current author included (see Conway (n 6)).

²⁵ See Conway (n 6).

²⁶ [2017] UKSC 17 at [16].

factored into conduct under s 3(1)(g) of the 1975 Act, or perhaps the deceased's obligations and responsibilities towards the applicant under s 3(1)(d).²⁷ However, it was important not to conflate the two questions and simply suggest that an order would be made under the 1975 Act where the deceased had acted unreasonably. As Lord Hughes stressed:

[T]he deceased may have acted unreasonably, indeed spitefully, towards a claimant, but it may not follow that his dispositions failed to make reasonable financial provision for that claimant, especially (but not only) if the latter is one whose potential claim is limited to maintenance.²⁸

The correct test was that set out by Oliver J in *Re Coventry*:²⁹ "it must...be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result".

In claims which are limited to maintenance under the 1975 Act,³⁰ the claimant's needs would often be asserted as had occurred in *Ilott*. According to Lord Hughes, "need...is a necessary but not a sufficient condition for an order" and there would be instances in which "[n]eed plus the relevant relationship to qualify the claimant,³¹ is not always enough".³² A lengthy estrangement between the parties was one such example, and could result in a claim being rejected under the 1975 Act.³³ Moreover, where a court decided that reasonable financial provision had not been made, the claimant's needs might not fully be met: the competing needs of other estate beneficiaries, as well as the relationship between the claimant and the deceased, could play a limiting role here.³⁴

What constitutes 'maintenance'?

The term 'maintenance' is not defined in the statute, though guidance can be found in several judgments- including that of Browne-Wilkinson J (as he then was) in *In Re Dennis (Deceased)*³⁵ who confined it to "payments which...enable the applicant...to discharge the cost of his daily living at whatever standing of living is appropriate to him". Somewhat regrettably, Lord Hughes in *Ilott* did not take the opportunity to develop this further, simply stating that maintenance "cannot extend to any or every thing which it

²⁷ Though it is more difficult to see how it fits into this latter category.

²⁸ [2017] UKSC 17 at [17].

²⁹ [1980] Ch 461 at 474-475 and cited with approval in [2017] UKSC 17 at [18].

³⁰ Namely, all applicants with the exception of a surviving spouse or civil partner of the deceased.

³¹ Such as the parent-child relationship in *Ilott*.

³² [2017] UKSC 17 at [19].

³³ [2017] UKSC 17 at [21].

³⁴ [2017] UKSC 17 at [22].

³⁵ [1981] 2 All ER 140 at 146.

would be desirable for the claimant to have” and must “import provision to meet the everyday expenses of living”.³⁶

Of course, the more pertinent issue here was whether a lump sum of £143,000 to purchase a house could be properly described as maintenance, and the clear inference from the Supreme Court judgment is that the Court of Appeal had erred in that respect. The statutory power was “to provide for maintenance, not to confer capital on the claimant”;³⁷ and while provision of housing can constitute maintenance in some cases, Lord Hughes suggested that a life interest would be more appropriate than a capital sum.³⁸

Bad News for Independent Adult Children?

For all the attention it attracted, *Ilott* was an atypical case, and one suspects that few other applications will replicate this particular scenario. In rowing back significantly from the award made by the Court of Appeal, the Supreme Court was not suggesting that independent adult children would *never* succeed under the 1975 Act; however, the clear inference is that claims by adult children who are financially independent from their parents (or, at least, capable of earning their own living) will be treated cautiously by courts and can expect (on satisfying the threshold test) much less generous awards than the one made by the Court of Appeal. In this sense, the Supreme Court decision probably returns the law to its pre-*Ilott* position in England and Wales.³⁹

Having said that- and wary of the dangers of entirely speculative assessments- one wonders whether the outcome would have been different if mother and daughter had not been estranged, or if Melita Jackson had had other children and left the bulk of her estate to them, or to a new husband having remarried at some stage.⁴⁰ Interesting questions may still arise where an adult child, although not dependent on his/her parents, received some level of ongoing financial support- for example, help with living expenses, unpaid childcare for grandchildren- but receives little or nothing under a parent's will. This might strengthen a potential claim under the 1975 Act, but is no guarantee of success; as Lord Hughes pointed out in *Ilott*, the fact that the deceased had been “supporting the claimant in some way” can bolster a claim that “future

³⁶ [2017] UKSC 17 at [14].

³⁷ [2017] UKSC 17 at [15].

³⁸ This would mean moving away from a ‘clean break’ settlement, which may not always be in the parties’ interests. Whether subsequent cases adopt this approach remains to be seen.

³⁹ Though it will be interesting to see how courts in Northern Ireland (who have always been much more generous towards independent adult children under the equivalent Inheritance (Provision for Family and Dependants (NI) Order 1979- see Conway (n 6), pp 127-130) will apply the Supreme Court ruling.

⁴⁰ In the latter scenario, adult children tend to fare badly since our succession laws favour a surviving spouse. For a recent illustration, see *Ames v Jones*, County Court (Central London), 19 August 2016.

maintenance was reasonably required, or [it can]...demonstrate that support was given in circumstances in which there is no obligation to continue it after death".⁴¹ As ever, such issues must be resolved on a case-by-case basis.

Good news for charities (and chosen beneficiaries more generally)

The three animal charities in *Ilott* were mentioned only briefly in the Supreme Court judgment, but the significance of what was said should not be overlooked. One factor that courts must assess in family provision claims is the financial resources and needs of any beneficiary of the estate.⁴² The Court of Appeal in *Ilott* had taken the view that the deceased's chosen charities did not have a "competing need" and would "not be prejudiced" by the higher award made to the daughter.⁴³ Any money they received was effectively a windfall. Lord Hughes, however, was extremely critical of this approach:

The claim of the charities was not on a par with that of Mrs Ilott. True, it was not based on personal need, but charities depend heavily on testamentary bequests for their work....More fundamentally, these charities were the chosen beneficiaries of the deceased.⁴⁴

Increasing the sum awarded to the daughter had a considerable financial impact on the charities here, because it significantly reduced their collective bequests; the reality, as Lord Hughes pointed out, is "that an award under the Act is at the expense of those whom the testator intended to benefit."⁴⁵

Charities will welcome the Supreme Court ruling, for obvious reasons. Though heavily reliant on public funding in order to survive, in the wake of the Court of Appeal ruling, charities were probably less inclined to defend family provision claims where bequests to them were subsequently challenged. That is likely to change now, with charities more confident of a positive outcome. More generally, when wills are contested under the 1975 Act, nominated beneficiaries do not have to justify their selection nor do they have to demonstrate some sort of financial need (though, it goes without saying that their needs will be highly relevant in practice); the simple fact is that they were chosen by the deceased, in a clear expression of testamentary intent.

⁴¹ [2017] UKSC 17 at [3].

⁴² 1975 Act, s 3(1)(c).

⁴³[2015] EWCA 797 at [60].

⁴⁴ [2017] UKSC 17 at [46].

⁴⁵ [2017] UKSC 17 at [46].

Bigger legislative and policy issues remain

Running through the entire *Ilott* saga are two significant issues, which may yet be revisited. Alluding to these in a supplementary judgment, Lady Hale (with whom Lord Kerr and Lord Wilson agreed) commented on the “unsatisfactory state of the current law”⁴⁶ and the absence of legislative guidance in the 1975 Act on whether adult children should be awarded reasonable provision for their maintenance from a dead parent’s estate.⁴⁷ Critical of the Law Commission’s failure to address this when it last looked at family provision claims,⁴⁸ Lady Hale also highlighted the Act’s failure to advise on how the various section 3 factors should be evaluated or competing claims on the deceased’s estate weighed against each other. A much bigger (and more complicated policy issue) stems from the fact that the daughter and her family were dependent on state benefits, yet her mother left a sizeable estate entirely to charity. As Lady Hale pointed out, our succession law “has not, or not yet, recognised a public interest in expecting or obliging parents to support their adult children so as to save the public money”.⁴⁹ This would be a significant step, and one which would probably attract conflicting opinions.

Plus ça change, plus ce n’est pas change...

The Supreme Court ruling in *Ilott* is not a landmark one in the sense of fundamentally altering the law on family provision. However, it is an important one in terms of analysing the 1975 Act and its operation, and emphasising some core principles.

The judgment re-centralises testamentary freedom, and reassures will-makers that, while their wishes may not always be respected, they now have much more prominence in family provision claims. Chosen beneficiaries are exactly that: the persons or bodies listed in the will, and who do not need to justify their inclusion or prove some sort of competing need when defending family provision claims. In contrast, independent adult children who have been disinherited by their parents will take little comfort from the Supreme Court ruling, and lawyers advising them should downgrade the chances of success or caution about more modest awards.

At the same time, the judgment tells us some things we already know about family provision claims. The 1975 Act creates a discretionary system, operating within

⁴⁶ [2017] UKSC 17 at [63].

⁴⁷ The only specific factor that courts must look at in claims by children (whether adults or minors) is “the manner in which the applicant was being or in which he might expect to be educated or trained”- 1975 Act, s 3(3).

⁴⁸ Law Commission Consultation Paper No 191, *Intestacy and Family Provision Claims on Death* (2009), followed by Law Com No 331 (2011).

⁴⁹ [2017] UKSC 17 at [65], though Lady Hale had earlier noted that familial obligations to maintain one another in order to protect the public purse are a feature of family law- [2017] UKSC 17 at [63].

statutorily defined parameters and requiring value-judgments based on “very variable personal and family circumstances”.⁵⁰ Individual outcomes will still be difficult to predict; decisions are fact-sensitive, and different judges can reach fundamentally different conclusions⁵¹ on the same set of facts- something the entire *Ilott* saga illustrates perfectly.⁵² Meanwhile, appellate courts should only intervene where there has been an error of law or principle, and should resist the urge (no matter how strong) to substitute the judgment that they would have made if hearing the case in the first instance.⁵³ As Lord Hughes pointed out, it is to “‘kill the parties with kindness’ to permit marginal appeals in cases which are essentially individual value judgments such as those under the 1975 Act should be”.⁵⁴

It will be interesting to see how the Supreme Court ruling shapes future family provision claims. First instance judges faced with such cases may regret two things: that the concept of maintenance was not clarified further, and that there is still no guidance on how the diverse factors listed in the 1975 Act should be evaluated and weighed against each other. Taken in conjunction with the other issues raised in the case, one wonders whether the law in this area will be reviewed in the future.⁵⁵

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⁵⁰ *Ibid* at [24].

⁵¹ Both on the threshold test, and the issue of quantum.

⁵² In her supplementary judgment, Lady Hale set out three contrasting decisions that the District Judge would have been perfectly entitled to make in the present case, namely (i) making no order at all (what Eleanor King J decided); (ii) doing what the Court of Appeal effectively did in 2015; or (iii) reaching the decision that he reached back in 2007- [2017] UKSC 17 at [65].

⁵³ The Court of Appeal, in its 2011 decision in *Ilott* overturned Eleanor King J's judgment on this point, though (somewhat ironically) seemed to fall into the same trap when it heard the case for second time; reading the 2015 report, one gets the sense that the Court of Appeal was searching for a reason to overturn the District Judge's ruling on quantum, and substitute a more generous award.

⁵⁴ [2017] UKSC 17 at [24] drawing on the observations of Lord Hoffman in *Piglowska v Piglowska* [1999] 1 WLR 1360.

⁵⁵ It is worth pointing out that the Irish Law Reform Commission is currently looking at inheritance claims by children of a deceased parent- Law Reform Commission, *Section 117 of the Succession Act 1965: Aspects of Provision for Children* (LRC 118-2017).