Blurring the focus? The Supreme Court's decision in *Ilott v The Blue Cross*

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Abstract

In March 2017, the Supreme Court handed down judgment in the first appeal in a family provision case ever to be heard at that level: *Ilott v The Blue Cross* [2017] UKSC 17. This article examines the approach taken by the seven Justices of the Supreme Court to the tension between testamentary freedom and the jurisdiction to make provision under the 1975 Act, as well as how they dealt with the key issues of the status of charitable defendants and whether a claimant's state benefits should be preserved. The author suggests that it is vital to preserve the flexibility of the jurisdiction created by the Inheritance (Provision for Family and Dependants) Act 1975 so as to provide individualized justice.

Introduction

The concept of family provision tends to be divisive. There are those who consider it unacceptable to restrict testamentary freedom in any way, whilst others consider it a hallmark of a civilized society that a testator's children, spouse, partner, and/or dependants should be supported, to some extent at least, by his estate. This is brought into sharp focus where the alternative to provision from the testator's assets is provision by the state through tax credits and the benefits system, and indeed where those who are named as beneficiaries in a will may be thought by some to have less of a moral claim on the estate than those who are excluded from it.

In many common law jurisdictions, the legislature has taken the view that it is appropriate to make inroads into testamentary freedom by introducing a statutory system for the court to grant relief out of an estate to those connected with the deceased by marriage or other forms of relationship or partnership, including pure dependency. Such a system is generally thought to be the 'lesser evil' as opposed to any system of forced heirship or fixed shares for particular classes of relation or spouses, despite the fact that testators in all jurisdictions which have family provision legislation do not have true 'freedom' in that they cannot be sure that the intended distribution of their assets will not be varied post-death by the court determining a family provision claim.

In March 2017, the Supreme Court handed down judgment in the first appeal in a claim under family provision legislation in this jurisdiction ever to be heard by the House of Lords or Supreme Court: the case of *Ilott v The Blue Cross* [2017] UKSC 17[1] which was an appeal in a claim under the Inheritance (Provision for Family and Dependants) Act 1975 ('the 1975 Act'). As will be seen from a summary of the facts below, the case highlighted the tension between testamentary freedom and the jurisdiction to make provision under the 1975 Act. It also involved issues of how to deal with a claim where a claimant is reliant upon state benefits and the status of charitable

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1. Reported at [2017] 2 WLR 979, formerly *Ilott v Mitson*.

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defendants. It appears from the judgment of Lord Hughes (with whom the other six Justices of the Supreme Court agreed) and from the supplemental judgment of Lady Hale (with whom Lord Kerr and Lord Wilson agreed) that there was concern as to the range of possible outcomes in claims under the 1975 Act, and particularly in an 'unusual' case like *Ilott*.[2] This seems to have based upon the assumption that different judges would take different but equally legitimate views as to the relevance and weight to be attached to key factors such as the estrangement between the claimant and her mother, and the claimant's obvious financial needs.

It is suggested that it has at all times been the intention of Parliament to give the court discretion in such cases so as to provide individualized justice. Any attempt to fetter that discretion by imposing further statutory guidelines would run the risk of injustice in the many 'unusual' cases which come before the courts and might undermine the very purpose of the legislation which is to entrust judges to consider each case on its own facts so as to adapt the relief (if any) to the particular case. Although it can be frustrating for practitioners not to have more certainty as to the outcome of a case, it is suggested that the 1975 Act is more of a surgeon's scalpel than a blunt instrument; it can be used by the Court to tailor relief in a very precise way to reflect the detailed facts of the case. In this way and as intended by Parliament, justice is done in the best way possible in what can be very difficult circumstances.

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Facts

Mrs Heather Ilott brought a claim under section 1(1)(c) of the 1975 Act against the estate of her mother, Mrs Melita Jackson, who died in 2004. Mrs Jackson left the entirety of her estate (worth about £486,000) to three national bird and animal welfare charities,[3] with which she had no proven connection during her lifetime ('the Charities'). There was no evidence that Mrs Jackson had any particular interest in animal welfare or birdlife.[4]

The claimant and Mrs Jackson had been estranged for many years, following the claimant's decision in 1978 to leave the family home at the age of 17 to live with her boyfriend (now husband) of whom Mrs Jackson disapproved. Although the trial judge found fault on both sides for the estrangement, he held that the principal reason for the lack of a successful reconciliation and for Mrs Jackson's testamentary wishes was Mrs Jackson's inability to come to terms with her daughter's decision to leave home and live with her boyfriend.[5] The trial judge further stated that a reasonable parent should have come to terms with what Mrs Jackson regarded as a rejection of herself and that it was reasonable for the claimant to hope that her parent would accept her choice of partner.[6] Mrs Jackson was a lonely, isolated, and reclusive woman.[7] The judge concluded that Mrs Jackson's rejection of her only child at the age of 17, which she maintained for the rest of her life, was 'unreasonable' and that it had led to Mrs Jackson harshly and unreasonably excluding her daughter from any financial provision in her will despite her daughter's 'constrained and needy financial circumstances' and despite her daughter's attempts at reconciliation.[8]

The claimant worked for several years as a bank teller. She gave up work shortly before the birth

2. [2017] UKSC 17, para 66.
3. The Blue Cross Animal Welfare Charity, the Royal Society for the Protection of Birds, and the Royal Society for the Prevention of Cruelty to Animals.
4. Judgment of DJ Million, 7 August 2007, para 44.
5. ibid, paras 42, 43.
6. ibid, paras 58, 63.
7. ibid, para 45.
8. ibid, paras 60, 64.

of her first child, and subsequently her primary occupation was that of raising her five children. Her husband, although suffering from a medical condition, worked throughout the marriage. The majority of the family's income derived from state benefits, and (to their credit) the claimant and her husband had always lived within their means. The family's lifestyle was extremely modest. Their home was in need of repair. Their household appliances, carpets, and furnishings needed replacing. They had never been able to afford for their children to enjoy any hobbies or family meals or days out, and the family had never been able to enjoy a holiday.

The claimant and her family had lived for many years in a three-bedroom house rented from a housing association with the assistance of housing benefit. The claimant had the right to buy that house for a discounted price, but did not have the means to do so.

Procedural history

At first instance, DJ Million sitting in the Principal Registry of the Family Division found that Mrs Jackson had failed to make reasonable financial provision for her daughter in her last will, and awarded £50,000 to the claimant. The claimant appealed against the amount of the award, and the Charities cross-appealed contending that the claim should have been dismissed. In 2009, Eleanor King J allowed the Charities' cross-appeal and did not consider the claimant's appeal as to the amount of the award.[9] In 2011, the Court of Appeal (Sir Nicholas Wall P, Arden, and Black LJJ) allowed the claimant's appeal and remitted her outstanding appeal as to the amount of the award to a Judge of the Family Division.[10] (The Charities were refused permission by Lady Hale, Lord Kerr and Lord Dyson JJSC to appeal this decision to the Supreme Court.) In 2013, Parker J dismissed the claimant's appeal as to the amount of the award.[11] In 2015, the Court of Appeal[12] (Arden and Ryder LJJ, Sir Colin Rimer) allowed the claimant's second appeal, holding that DJ Million's order had been wrong on the grounds that he had made two 'fundamental errors':

1. the judge, while entitled to limit the award based on the claimant's limited expectation of inheritance and ability to live within her means, had failed to explain what the award might otherwise have been and to what extent it was limited by those matters[13];
2. the judge had failed to ascertain the effect of his award of £50,000 on the claimant's state benefits.[14]

The Court of Appeal set aside the judge's award, and in exercising its own discretion awarded the claimant a lump sum of £143,000 (the cost of buying her house under the right-to-buy scheme), reasonable expenses of purchasing the property and an option to take a further sum up to a maximum of £20,000 so that the claimant could continue to claim state benefits if she chose to do so. In 2016, the Charities were given permission to appeal to the Supreme Court on condition that the costs order made in the claimant's favour in the Court of Appeal in 2015 remain undisturbed. The Supreme Court allowed the Charities' appeal and restored the £50,000 award to the claimant made by DJ Million.[15] The Supreme Court was critical of the reasoning of the Court of Appeal and rejected its finding that the trial judge had made the two alleged 'fundamental errors'.

9. *Ilott v Mitson* [2009] EWHC 3114 (Fam), [2010] 1 FLR 1613.
10. *Ilott v Mitson* [2011] EWCA Civ 346, [2012] 2 FLR 170.
11. *Ilott v Mitson* [2013] EWHC 542 (Fam).
12. *Ilott v Mitson* [2015] EWCA Civ 797, [2016] 1 All ER 932, [2015] 2 FLR 1409.
13. Judgment of Arden LJ, para 35.
14. ibid, para 36.
15. By agreement, there was no order as to the costs of the appeal in the Supreme Court.

History of family provision

Although there appears to be barely any awareness of the existence of the 1975 Act outside the legal profession (or indeed, beyond the confines of the private client world), family provision legislation is widespread amongst common law jurisdictions and has existed for many decades. The Parliament of New Zealand were the pioneers, passing in 1900 the Testators Family Maintenance Act which gave the court jurisdiction to make provision for a testator's spouse or child (of any age) if the testator had made inadequate provision for the applicant's 'proper maintenance and support'. The legislation was primarily promoted as a measure to alleviate a burden on the public purse, but was generally applied to adjust private rights.[16] Most importantly, the jurisdiction bestowed upon the court was discretionary, so that a balance might be struck between preserving testamentary freedom and the public policy of requiring a testator to make provision for certain members of his family. Over the next few decades, other prominent common law jurisdictions introduced their own versions of family provision legislation, including all Australian jurisdictions, most Canadian jurisdictions, and England and Wales.

After some 10 years of Parliamentary debate and various attempts to adopt a form of the New Zealand system,[17] our Parliament eventually passed the Inheritance (Family Provision) Act 1938, which limited the class of claimants to spouses, infant sons, unmarried daughters, and children who could not maintain themselves due to physical or mental disability. There was considerable debate in the years leading up to the 1938 Act as to whether it was appropriate to restrict testamentary freedom at all. Lord Haldane and Viscount Hailsham, former and present Lord Chancellors respectively, were both vehemently opposed to any such proposition. In 1931, the Chancery Judges wrote to the Parliamentary committee tasked with considering the then Bill expressing 'grave objections' to any legislation which would introduce a partial system of fixed shares in an estate and expressing unenthusiastic support for a discretionary system of considering family provision on a case-by-case basis. In 1937, the Chancery Judges submitted to the Lord Chancellor that jurisdiction under the Bill could be exercised 'without any indispensible difficulty'.

There was a wholesale review of the family provision legislation in the early 1970s, introduced in 1971 by the Law Commission's wide-ranging Working Paper on Family Property Law.[18] When the Law Commission's draft Bill, which included amendments to enable adult children to apply for provision, was introduced in the House of Lords in 1975, it became apparent that the Chancery Judges' optimism in 1937 may have been misplaced, at least in the experience of Lord Wilberforce (then the senior Chancery Lord of Appeal). Lord Wilberforce spoke in the House of Lords as a judge who had determined claims under the 1938 Act, which he described as a 'very difficult jurisdiction for the judge to exercise'. He went on to say that trying to reach a decision in such cases as to

> how to distribute the merits and demerits [amongst a wife, widow, possible mistress, illegitimate children] is painful and exceedingly difficult. I am by no means certain that one is able in many cases to reach the right result. All one can do is to do one's best and hope that the result is what it should be.

These remarks do not appear to have fallen on fertile ground and the Bill was approved.

1975 Act: a challenge for judges?

The frustration expressed by Lord Wilberforce 42 years ago as to the practical challenges faced by judges grappling with a claim under the 1938 Act has been echoed by Lady Hale in *Ilott* who gave a supplemental judgment (with which Lord Kerr and Lord Wilson agreed) which she said she had written

16. ELG Tyler and RD Oughton. *Tyler's Family Provision* (3rd edn, LexisNexis Butterworths, 1997) 8.
17. See further the masterly summary of the history of the 1938 and 1975 Act in: ibid 9ff.
18. Family Property Law (1971) Working Paper No 42.

'only to demonstrate what, in my view, is the unsatisfactory state of the present law'. She highlighted the range of public opinion about the circumstances in which adult children ought or ought not to be able to make a claim against a parent's estate, and said that that range of opinion may well be shared by judges.[19] Lady Hale went on to say that:

> the problem with the present law is that it gives us virtually no help in deciding how to evaluate [claims under the 1975 Act] or balance them with other claims on the estate.

In particular, she noted that there was no guidance as to whether the court should intervene to relieve the public purse where a claimant is reliant upon state benefits, although it has been recognized by the House of Lords that such a public interest is embedded in the legislation for ancillary relief.[20]

Lady Hale presented a graphic illustration of her point by noting that there were 'at least' three very different outcomes which would all have been legitimate in the present case, namely (i) dismissal of the claim on the basis of the claimant's self-sufficiency (albeit her dependency on public funds) and, in summary, her lack of connection to her mother other than a blood relationship, (ii) making an award which struck a balance between giving the claimant what she needed and saving the public purse the most money (as the Court of Appeal, in effect, did), and (3) making an award of £50,000 for the reasons given by the trial judge. This point was also made, albeit less emphatically, in the judgment of Lord Hughes, who recognized that it would have been legitimate for a judge to have dismissed the claim on the basis of the long estrangement between the claimant and her mother,[21] and recognized that the trial judge was 'perfectly entitled' to reach the conclusion he did[22] and that it would also have been legitimate to have awarded the claimant reasonable financial provision by way of housing.[23]

The Supreme Court's decision in *Ilott* therefore highlights what practitioners have always been aware of, namely that the outcome in many claims under the 1975 Act is inherently uncertain (although of course the degree of uncertainty depends on the case). However, it is important to ask whether it is worth seeking either to extinguish that uncertainty or to reduce its scope by imposing further statutory restrictions either on claims under the Act generally or upon certain categories of claim. It is suggested that imposing any such further restrictions runs the risk of thwarting the court's ability to achieve a just result in the myriad of different circumstances which may arise in claims under the Act. Further, although there may be multiple legitimate outcomes in a particular case, from a judge's point of view it is less likely that he or she will be wrong in reaching a particular result. Certain claims under the 1975 Act may well pose difficult and sometimes soul-searching questions for judges, but it is suggested that it is preferable for such claims to be determined by a judge who is able to take into account the minutiae of the circumstances in the case rather than to be subject to any mandatory regime of tighter statutory guidance.

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Testamentary freedom

Testamentary freedom is a treasured concept in this jurisdiction, although in fact there has barely been a time when there was absolute testamentary freedom in

19. para 58.
20. *Hyman v Hyman* [1929] AC 601, 629 (Lord Atkin).
21. para 35.
22. para 35.
23. para 44.

English law.[24] Considerations of testamentary freedom were at the heart of the Parliamentary debates which led to the creation of the first family provision legislation here in 1938, but since the coming into force of the 1938 Act, testamentary freedom in its true sense has effectively not existed here as a result of the will of Parliament. The Court has consistently recognized that testamentary freedom is subject to statutes such as the 1975 Act.[25] Each of the reforms to the family provision legislation since 1938 has represented a further inroad into or restriction upon testators' freedom to distribute their estate as they choose. Testamentary freedom has also been subject to the possibility that the deceased's beneficiaries might enter into a deed of variation of his will, or that the Court might vary a testamentary trust under the jurisdiction conferred on it by the Variation of Trusts Act 1958.

It is suggested that it would therefore be wrong to regard the principle of testamentary freedom as inviolable. Indeed, there are few common law jurisdictions which retain absolute unfettered testamentary freedom.[26] In most jurisdictions, the disposition of property on death is subject either to forced heirship, elective shares or community property regimes, or to family provision legislation.[27]

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Relevance and weight of testamentary wishes

There are a few traces in 1975 Act authorities of a propensity by the court to attach some weight to testamentary wishes, for example, the statement of Thorpe J in *Davis v Davis*[28] (cited by Nourse LJ in *Re Krubert, decd*[29]) that 'It is not for this court to rewrite the testamentary provisions of deceased persons lightly'. It is worth noting that in the course of the claimant's successful appeal to the Court of Appeal on the 'threshold' issue in 2011 (in respect of which the Charities were refused permission to appeal to the Supreme Court), the Charities submitted that DJ Million's decision 'wrongly diminished the respect that ought to be given to testamentary freedom'[30] and that if adult children were permitted to make an application under the 1975 Act on the basis of need alone, such an interpretation of the Act would deprive testators of testamentary freedom.[31] Black LJ stated that:

> [the Appellants'] submissions seem to me to be an invitation to us to embellish the words of the statute and amount, in my view, to an impermissible attempt to prescribe the exercise that has to be carried out in this sort of case by requiring the application of a principle of some kind in addition to the plain words of the statute itself.[32]

However, the Supreme Court's decision in *Ilott* has given renewed prominence to testamentary wishes. Indeed, the following statement by Lord Hughes at paragraph 47 of his judgment is likely to provoke debate and potentially add another string to the bow of defendants to claims under the 1975 Act:

> It is not the case that once there is a qualified claimant and a demonstrated need for maintenance, the testator's wishes cease to be of any weight. They may of

24. Unrestricted testamentary freedom only existed between 1891 and the coming into force of the Inheritance (Family Provision) Act 1938, but substantial testamentary freedom existed in England during the 18th and 19th centuries: see *Tyler's Family Provision* (n 16) 3–6.
25. *Re Coventry* [1980] 1 Ch 461, 474G (Oliver J); *Espinosa v Bourke* [1999] 1 FLR 74 (Butler-Sloss LJ); *Gill v Woodall* [2011] Ch 380, 390G (Lord Neuberger MR).
26. These include the Cayman Islands and the British Virgin Islands.
27. Jurisdictions which have family provision legislation include New Zealand, Australia, Canada, Northern Ireland, Hong Kong, Guernsey, and the Isle of Man.
28. [1993] 1 FLR 54, 59–60.
29. [1997] Ch 97.
30. para 71 (Arden LJ).
31. para 87 (Black LJ).
32. para 96 (Black LJ).

> course be overridden, but they are part of the circumstances of the case and fall to be assessed in the round together with all other relevant factors.

It is suggested that this statement can only be read as requiring the testator's wishes to be a mandatory factor for the Court to consider in every case under section 3(1)(g) of the 1975 Act as part of all the circumstances. One view, in line with the statement of Black LJ in the 2011 decision referred to above, is that this imposes an additional hurdle for the claimant to surmount in every case. However, it is suggested that this is probably not how Lord Hughes' statement will be applied in practice and that it probably does not represent a sweeping change in how the court will approach claims against a testate estate. (One of the most obvious consequences of Lord Hughes' statement is that intestacy may be thought to create an advantage for a claimant as testamentary wishes would not have to be taken into acount, save for the unlikelihood that there might be evidence that the deceased deliberately died intestate knowing that the intestacy rules reflected his testamentary wishes.)

> *[Ilott] probably does not represent a sweeping change in how the court will approach claims against a testate estate*

It seems reasonable to expect a judge to take into account in any consideration of testamentary wishes the following factors:

i. the reasonableness of the testator's wishes, which Lord Hughes stated at paragraph 17 may undoubtedly be a further factor under section 3(1)(g) and sometimes 3(1)(d); [If there is any explanatory note accompanying the will, the court is likely to be prepared to consider the factual accuracy of any such note, as it did in *Ilott.*]
ii. how recently the testator expressed the wishes in a will, and whether the testator had indicated any intention to change his last will;
iii. the knowledge the testator had at the time of making the will;

and

i. (possibly) the consistency of his wishes and the length of time for which he had held such wishes.

It is suggested that any of these factors may have a substantial impact, either positive or negative, on the weight and relevance of the deceased's testamentary wishes. However, any evidence as to any of these factors would have no doubt been relied upon by any of the parties to a 1975 Act claim even prior to the Supreme Court's decision in March 2017, and therefore it seems unlikely that there will be a marked change in the court's approach to such claims as a result of Lord Hughes' statement referred to above.

Status of charitable defendants

Despite the fact that the status of charities as defendants was one of the key issues in the Charities' appeal to the Supreme Court, the Supreme Court did not state explicitly whether it considered that there should be a public policy of encouraging charitable giving which should be factored into the court's approach to claims under the 1975 Act. Nor, indeed, did it comment on previous case law to the effect that charities should be regarded as in no different position to other defendants who do not choose to put in evidence of needs. In fact, in *Ilott,* the Charities did make written submissions when applying for permission to appeal referring to their reliance upon testamentary donations, although none of them could point to any particular financial 'need'. It did not appear to be controversial in the course of oral submissions in the Supreme Court that a smaller charity intimately connected with or reliant upon a testator might be able to show 'need' or 'obligation' for the purposes of section 3(1)(c) and (d).

Lord Hughes made only brief comments as to the position of charities as defendants at paragraph 46 of his judgment, which (it is respectfully suggested) have not clarified the picture as to the status of charities, but indeed may cause some scope for further argument in the future. He said this:

> 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, which is by definition of public benefit and in many cases will be for demonstrably humanitarian purposes. More fundamentally, these charities were the chosen beneficiaries of the deceased.

This statement may be construed as suggesting that charities should be regarded by the court as having 'needs' even though such needs are not personal. If Lord Hughes' statement is to be construed as attributing 'need' to charities for the purposes of the 1975 Act, this will have broken new ground as historically the court has treated charitable defendants as though their needs were simply a neutral factor. It is, however, respectfully suggested that it remains unclear whether any such 'needs' of a charitable defendant should be regarded as greater or lesser than those of a needy claimant, and what weight the court should attribute to the 'public benefit' of charitable work. Lord Hughes' statement may also be construed as implying that the purpose of the particular charitable defendant may be relevant. For example, it might be argued in the future that if the purpose of the charity is 'demonstrably humanitarian', that should be an additional factor for the court. Further difficulties may arise if the purpose of a defendant charity relates to, for example, a medical condition suffered by the claimant: how should the court weigh up the 'needs' of the charity as opposed to the needs of the claimant? As with all difficulties in 1975 Act claims, there is no straightforward answer to these questions, which will no doubt be answered on a case-by-case basis in due course.

Role of state benefits

Another key issue in *Ilott* appeal was the role of state benefits, and in particular whether as a matter of public policy the court should structure an award so as to preserve a claimant's entitlement to state benefits or whether it is appropriate for the court to seek to relieve the public purse of expenditure. It is respectfully suggested that the Supreme Court simply did not grapple with this issue, although Lady Hale stated in her supplemental judgment[33] that:

> the 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.

She went on to say that it would have been legitimate for the Court to have made an order, an effect of which would have been to save the public purse the most money (paragraph 65(2)). However, in the main judgment Lord Hughes seems to have assumed that benefits should be treated as a resource of the claimant, and that the court must consider whether they will continue to be received,[34] but did not make any observations as whether, as a matter of public policy, the court should take any particular approach so as to preserve state benefits or the converse.

Conclusion

It remains to be seen how judges will apply, or indeed distinguish, *Ilott v The Blue Cross* in future claims under the 1975 Act. It seems unlikely that the 1975 Act will be substantially reviewed, amended, or indeed replaced in the near future and practitioners will therefore have to continue to advise clients as to the inherent uncertainties of outcome as a result of the multiplicity of factors under the Act. Although there is a tendency amongst some to bemoan the unpredictability of the award which might be made in 1975 Act claims, and whilst the difficulties of such claims must be acknowledged, it is suggested that our family provision legislation represents a breakthrough in family justice which should itself be valued. The flexibility of the family provision system

33. para 65(1).
34. para 38ff.

embodied in the 1975 Act is vital. Without such flexibility, there might be a risk of some form of 'forced heirship' effectively creeping into the Act or worthy claims falling through the cracks.

> *Our family provision legislation represents a breakthrough in family justice which should itself be valued*

The Supreme Court's decision in *Ilott* will no doubt be constantly referred to in future claims, particularly as to how testamentary wishes should be treated, although it is less obvious whether it has actually provided clarity on the key issues in the case or whether, as with all other judgments in 1975 claims, it will be seen largely as having turned on the 'unusual' facts of the case.

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