"How should adult children be treated under the 1975 Act? Ask Parliament"

Ilott (Respondent) *v* The Blue Cross and others (Appellants) [2017] UKSC 17

On 15 March 2017 Lord Hughes (with whom Lord Neuberger, Lady Hale, Lord Kerr, Lord Clarke, Lord Wilson and Lord Sumption agreed) handed down judgment in the case of ***Ilott***, turning over the decision of the Court of Appeal and restoring the order of the District Judge from 2007.

The Facts

The facts of this case will be bitterly familiar to most so they will not be rehearsed. A relatively pithy summary is provided courtesy of Lady Hale at paragraph 64.

The Procedural History

This case has yo-yoed up and down the courts for almost 10 years. In 2007 District Judge Million found for Ms Ilott on threshold and in exercising his discretion under section 2 ordered a lump sum payment of £50,000. This award was some way apart from Ms Ilott's "*distinctly ambitious*" opening position, from which it appears that the kitchen sink may well have featured somewhere.

Ms Ilott appealed on quantification and the Charities cross-appealed on threshold. The Charities succeeded before Mrs Justice King ([*2009] EWHC 3114 (Fam); [2010] 1 F.L.R. 1613*]) only to lose against Ms Ilott on her further appeal to the Court of Appeal ([2011] 2 FCR 1), who allowed the appeal on threshold. When the case was remitted to the High Court on quantification, Mrs Justice Parker dismissed the appeal ([*2014] EWHC 542 (Fam), [2015] 1 FLR 291*) against District Judge Million's award.

When Ms Ilott appealed for a second time against quantification to the Court of Appeal, this time scaling down her ambition to an award of capital provision for the purchase of her home and an additional £50,000 as capital for non-housing needs, alternatively for an award of capital in excess of that awarded by DJ Million to account for the loss of her Council Tax Benefit and Housing Benefit, the Court of Appeal allowed the appeal holding that District Judge Million had fallen into error in two fundamental respects (see: paragraphs 35 and 36). The Court of Appeal re-exercised the discretion and ordered a payment of £186,000 for the purchase of Ms Ilott's home and the option to take a further £20,000.

The Charities then appealed to the Supreme Court "*largely on principle*".

The Decision

The Court of Appeal had held that District Judge had fallen into error as follows:

> *"… at the end of para 67 of his judgment … DJ Million states that because of the appellant's lack of expectancy and her ability to live within her means, her award should be 'limited'. In the paragraphs which follow he does not state how he has limited the award to reflect those matters … Those matters might justify a less generous award than would otherwise be made, but, even if that was so, it was wrong in law to state that the award had been limited for those reasons without explaining what the award might otherwise have been and to what extent it was limited by the matters in question*" (Error 1)

The Supreme Court found (paragraph 35):

"The District Judge did not make the suggested or any error in taking into account the nature of the relationship between the deceased and the claimant… it could not be said that the judge was required first to assess reasonable financial provision on the basis of some supposed norm of filial relationship, neither particularly close nor particularly distant, and then to lift the provision by an identified amount to recognise the special closeness between the two ladies…the estrangement was one of the two dominant factors in this case; the other was Mrs Ilott's very straitened financial position"

The Court of Appeal had held that:

> "*The second fundamental error in my judgment is this. The judge was required to calculate financial provision for the appellant's maintenance. Yet he did not know what effect the award of £50,000 would have on her state benefits. He made a working assumption at the end of para 74 of his judgment that the effect of a 'large capital payment' (which would include an award such as he ultimately made) would disentitle the family to most if not all of their state benefits, Failure to verify this assumption undermined the logic of the award."* (Error 2)

The Supreme Court found (paragraph 38):

"He did not fail to address the impact on benefits of any order which he might make. On the contrary, although he had been provided on behalf of Mrs Ilott with no materials at all on this (as clearly he should have been if it was her case that the point was relevant), he was, unsurprisingly as a District Judge sitting regularly in the Principal Registry of the Family Division, sufficiently familiar with the structure of state benefits to work on the basis of the likely consequences for them. As can be seen, he specifically addressed the impact of benefits twice. First, in rejecting the part of the claim which was for the purchase price of the house, he concluded, correctly, that the income effect of enabling Mrs Ilott to buy the house would be limited to about £912 pa precisely because Housing Benefit was meeting the bulk of the rent…Secondly, he made the assumption (which can only have been in favour of the claimant) that a capital award of the kind that he made would disentitle her from "most if not all" of the "benefits" presently received…Although the Court of Appeal criticised him for not calling of his own motion for chapter and verse on the relevance of capital to benefits claims, it cannot be suggested that he was wrong to the disadvantage of the claimant in either of these conclusions."

The "*relevant date*" for the purpose of section 3(5) is the date of the hearing and not any appeal (paragraph 25).

The Impact of the Decision

For Ms Ilott and the Charities? Seemingly nothing. After all they had reached an agreement behind closed doors.

For the rest of us? There is nothing ground-breaking in what has been said. On the contrary, the Supreme Court made clear that *"there is no occasion for this court to attempt to meet every difficulty to which claims for family provision may give rise"* (paragraph 3).

General guidance has been given that the Court need not necessarily deal with threshold and quantification as a two-stage process, although they can in an appropriate case (paragraphs 23 and 24). Furthermore, the Court is required to make a single assessment and does not have to come up with a starting figure from which adjustments are then made by reference to the section 3 factors (paragraphs 34 and 35).

Other frequently recurring issues for adult claimants, and general questions over maintenance, have been usefully addressed.

Housing

The provision of a lump sum to purchase the house raised arguments over the provision of maintenance versus the creation of legacies i.e. income versus capital. Lord Hughes said at paragraph 15:

> "*As Browne-Wilkinson J envisaged (obiter) in In re Dennis (above) there is no reason why the provision of housing should not be maintenance in some cases; families have for generations provided for the maintenance of relatives, and indeed for others such as former employees, by housing them. But it is necessary to remember that the statutory power is to provide for maintenance, not to confer capital on the claimant. Munby J (as he then was) rightly made this point clear in In re Myers [2004] EWHC 1944 (Fam); [2005] WTLR 851 at paras 89-90 and 99-101. He ordered, from a very large estate, provision which included housing, but he did so by way not of an outright capital sum but of a life interest in a trust fund together with power of advancement designed to cater for the possibility of care expenses in advanced old age. If housing is provided by way of maintenance, it is likely more often to be provided by such a life interest rather than by a capital sum*"

> At paragraph 44 he commented that "*…the right order would be likely to have been a life interest in the necessary sum, rather than an outright payment of it. There was no discussion of this question in the judgment. The rather incidental reference to the possibility of equity release was founded no doubt on a tactically astute argument advanced on behalf of Mrs Ilott in the Court of Appeal, designed to clothe the claim for the price of the house with a vestige of income-provision, but it was not supported by any evidence of how the figures might work, nor of the impact on benefits which understandably concerned the court*"

On the face of it then, when dealing with claimants other than spouses or civil partners, the safe starting position to take would be that the provision of capital to purchase a house, or indeed the outright transfer of a house, is likely to be deemed an order in excess of income and therefore not "maintenance".

The treatment of claimants on benefits

There had been a suggestion in the Court of Appeal that the needs of a claimant on means-tested benefits was to somehow be equated to the needs of a claimant with a disability. Lord Hughes said that the Court of Appeal "*clearly cannot have meant that dependence on benefits increases the claimant's needs, as disability is likely to do…The court must have meant that, at least if they are means tested, receipt of them is likely to be a very relevant indication of her financial position*" (paragraph 45).

Whilst I'm not so sure that this interpretation does reflect what the Court of Appeal had in mind at that time, the position has been made clear by the Supreme Court that needs arising from reliance on benefits is not the same as the needs which will invariably follow a relevant disability.

The position of charities in 1975 Act claims

Seemingly no different from any other beneficiary. Whilst they have no "*personal*" needs, they "*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*" (paragraph 46).

The position of chosen beneficiaries

They have nothing to prove. Lord Hughes stated that the Charities, as with any other beneficiary, "*did not have to justify a claim on the basis of need under the 1975 Act, as Mrs Ilott necessarily had to do. The observation, at para 61 of the Court of Appeal judgment, cited above, that, because the charities had no needs to plead, they were not prejudiced by an increased award to Mrs Ilott is, with great respect, also erroneous; their benefit was reduced by any such award. That may be the right outcome in a*

particular case, but it cannot be ignored that an award under the Act is at the expense of those whom the testator intended to benefit" (paragraph 46).

Accordingly, when a defendant does not run a needs-based defence, it must fall to be considered as a neutral factor under section 3.

Spending sprees

Ms Ilott had sought a lump sum to pay for remedial works to the home and the replace a number of white goods etc. There was a (slightly) amusing debate as to what would be considered "deprivation of assets" if a claimant on means-tested benefits in receipt of a lump sum which would disentitle them to further benefits went on a "*spending spree*" to rid themselves of sufficient capital in order to re-claim the lost benefits.

At paragraph 41 Lord Hughes said that "*these items which Mrs Ilott needed to make the household function properly can perfectly sensibly fit within the concept of maintenance. The Court of Appeal rightly said that the 1975 Act is not designed to provide for a claimant to be gifted a "spending spree". But this kind of necessary replacement of essential household items is not such an indulgence; rather it is the maintenance of daily living*".

Since more clients are seeking provision in order to renew/replace their household items, it is useful to have the Justices' opinion on what type of spending is considered "maintenance".

Testamentary wishes

The Supreme Court said that it was "*not correct to say of the wishes of the deceased that because Parliament has provided for claims by those qualified under section 1 it follows that that by itself strikes the balance between testamentary wishes and such claims*" (paragraph 47).

Whilst the wishes of the deceased may ultimately be overridden, the wishes are a factor to be taken into account and considered in the round against the other factors.

The relationship of the deceased and the claimant

The Supreme Court has reminded us that whilst conduct may be a relevant consideration we need to be careful not to try to reward a claimant's good behaviour and penalise a deceased's bad behaviour.

What now for adult claimants?

No prescriptive guidance has been given as to how adult claimants are to be treated, nor could such prescription be given by the judiciary when the legislature has left it without explanation- see: Lady Hale's commentary at paragraphs 49 to 66.

So, how does one determine whether an adult child is deserving or undeserving of reasonable maintenance under the 1975 Act? Erm, ask Parliament.

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