

A New Lease of Life for Testamentary Freedom?

On 15 March 2017, the Supreme Court handed down its Judgment in the long running case of *Ilott v. The Blue Cross & Others*. This case concerned the estate of the late Mrs Melita Jackson, who died in 2004 leaving the vast majority of her estate, worth a little under £500,000, to animal charities with whom she had no real connection in her lifetime. Her adult daughter, Mrs Heather Ilott, who had been estranged from the deceased for some 26 years, was specifically excluded from benefitting. The deceased signed Letters of Wishes in 1984 and 2002 explaining why she had made no provision for her daughter. The evidence was that Mrs Ilott was aware that she was disinherited in her mother's Will and she had lived independently of her mother, albeit in straitened financial circumstances.

After Mrs Jackson's death, Mrs Ilott made a claim against her estate under the Inheritance (Provision for Family and Dependants) Act 1975, which enables certain categories of applicant to make a claim on the basis that the Will of the deceased (or the distribution of their estate on an intestacy) does not, when viewed objectively, make reasonable financial provision for the applicant. In the case of a Claimant other than a spouse or civil partner, the Court is required to determine what would be reasonable for the Claimant to receive for their maintenance, which in this context imports "*provision to meet the everyday expenses of living*". Various factors must be taken into consideration, including the financial resources and needs of the applicant as well as any beneficiary of the estate, any obligations and responsibilities the deceased had towards the applicant or any beneficiary of the estate, any physical or mental disability of the applicant or any beneficiary of the estate and any other relevant matter including the conduct of the applicant or any other person.

Mrs Ilott's claim was initially determined by District Judge Million in 2007. He found in Mrs Ilott's favour and awarded her £50,000. She appealed on the basis that she considered the award to be too low and the charity beneficiaries then cross-appealed, arguing that reasonable financial provision had been made for Mrs Ilott in the Will, i.e. none. The High Court Judge agreed with the charities and held that there was no failure to make reasonable financial provision for Mrs Ilott. She appealed to the Court of Appeal who upheld her appeal and sent the matter back to the High Court for it to determine the amount of the award. The Judge upheld the original award of £50,000.

Mrs Ilott then appealed that decision and the Court of Appeal upheld her appeal, finding that District Judge Million had made two mistakes of principle – first of all, he did not make clear how he evaluated the effect of the estrangement between Mrs Jackson and Mrs Ilott in his award and secondly he made the award without considering the effect it would have upon Mrs Ilott's benefits.

The Court of Appeal awarded her £143,000 to buy the property that she lived in and an option to receive a further £20,000, which was intended to be structured so that it would not affect her state benefits (although the Supreme Court doubted whether this would have been effective).

The Court of Appeal also took the view that, in order to balance the claims on the estate fairly, it was appropriate to treat a Claimant who is in receipt of state benefits in the same way as one who is elderly or disabled on the basis that this increased their need for living expenses. The Court of Appeal stated that it had balanced Mrs Ilott's needs against the claim of the charities, whom it said had no competing need (and one does wonder if the Court's decision may have been different if the estate had been left to other children of the deceased). The Supreme Court said that the claim of the charities was not on a par with that of Mrs Ilott, as the charities were the chosen beneficiaries of the deceased. The Supreme Court also pointed out that charities depend heavily on testamentary bequests for their work and, indeed, it was noted that the appeal was brought by the charities largely on principle, because of the potential impact that the Court of Appeal decision would have had on other cases. As has been reported in the press, Lord Hughes (who gave the Judgment with which all the other Judges agreed) stated that some arrangement had been arrived at between the parties in the event that the appeal succeeded, the details of which were not relevant to the Order that the Supreme Court made.

In stressing the importance of testamentary freedom in English law, the Supreme Court found that District Judge Million had not, in fact, made either of the errors identified by the Court of Appeal. The Supreme Court noted that cases under the 1975 Act involve value judgments based on the individual circumstances of each case and highlighted the fact that different judges will come to different conclusions faced with the same facts. The Supreme Court reinstated District Judge Million's decision on the basis that he was perfectly entitled to reach the conclusion that he had.

Lady Hale gave an additional Judgment, specifically to make clear the unsatisfactory state of the current law in 1975 Act cases, which involve the extremely difficult task of balancing a testator's right to leave their property to whomever they wish and a testator's obligations to their family, especially those in receipt of state benefits. Lady Hale noted the different moral attitudes that the public has in relation to whether or not children should inherit from their parents including, for example, whether children should benefit equally or whether, if one has cared for a parent whilst another has not, the child who cared for the testator has "earned" a greater share of their estate. Lady Hale expressed concern that there should be clear guidance in the legislation on how the Court should weigh up the factors to be taken into account in deciding whether an adult child is deserving or undeserving of reasonable maintenance.

In the interim, 1975 Act cases will remain extremely difficult to predict, given that the individual Judge in each case will make his or her own value judgment. However, it is helpful that the Supreme Court has taken this opportunity to stress the underlying principle of testamentary

freedom in English law and the fact that just because an applicant may have financial needs, this is not always enough to justify a claim.

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