Value judgment

Ilott v Mitson *[2017] misses the chance to clarify financial provision for adult children. Natasha Dzameh discusses the Supreme Court judgment*

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Complete freedom of testamentary disposition permits the unsatisfactory situation whereby a testator fails to make provision for their spouse and/or children. In order to prevent these instances occurring the Inheritance (Family Provision) Act 1938 (the 1938 Act) was effected. However, it could only be relied upon where the deceased had executed a will, and the question of reasonable financial provision in relation to children concerned a far narrower understanding of the term 'children'; there was no definition of the word, instead the 1938 Act specified when a son or daughter would qualify. The relevant Act is now the Inheritance (Provision for Family and Dependants) Act 1975 (the 1975 Act). The 1975 Act expanded significantly upon the 1938 Act but with this expansion came certain grey areas, particularly how to treat an adult child's application for reasonable financial provision.

It was hoped by practitioners in the field that the Supreme Court would take this opportunity to provide some much-needed direction on the operation of the 1975 Act. Unfortunately, this was not capitalised upon in the judgment handed down on 15 March 2017. Lady Hale acknowledges that the present law is 'unsatisfactory' and that it gives 'no guidance as to the factors to be taken into account in deciding whether an adult child is deserving or undeserving of reasonable maintenance.' This provides little solace to practitioners advising on claims by adult children under the 1975 Act. Almost ten years have elapsed between the date of the first instance decision and the handing down of the Supreme Court's judgment. Consequently, the case of *Ilott v Mitson* [2017] serves as a stark warning to those who insist on litigating these types of claims rather than engaging in mediation.

Background – first instance decision, High Court and the Court of Appeal

The deceased (Mrs Jackson) died aged 70 leaving a net estate of £486,000. She had executed a will on 16 April 2002 (the will) under which the beneficiaries were 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 (the charities). There was no provision in the will for Mrs Jackson's daughter (Mrs Ilott). In fact, a letter of wishes accompanied the will in which Mrs Jackson explained the reasons why she had made no provision for Mrs Ilott. Mrs Jackson and Mrs Ilott had been estranged for many years following Mrs Ilott's decision to leave home and move in with her boyfriend and his parents. This occurred when she was around 17 or 18 years old. Mrs Jackson had not approved of Mrs Ilott's choice of boyfriend. Mrs Ilott subsequently married him and they had five children. There were three attempts at a reconciliation over the years, but each time the reconciliation was short lived.

Mrs Ilott resided in a three bedroom house with her husband and the youngest four children. This was a property rented from a Housing Association in a village in Hertfordshire. She had undertaken no paid work since the birth of her eldest son. The net income for the family in 2006/2007 was £14,155, of which 75% was said to be due to state benefits.

Mrs Ilott made a claim under the 1975 Act on the basis that the will did

not make reasonable financial provision for her. The charities opposed the claim. After a two day trial on 29 and 30 May 2007, District Judge Million determined that the will failed to make reasonable financial provision for Mrs Ilott and awarded her the sum of £50,000. Mrs Ilott appealed against quantum. The charities cross-appealed on the basis that, had the judge applied the law properly, he would have determined that no provision for Mrs Ilott was reasonable provision.

It was not until 9 October 2009 that the case came before Mrs Justice Eleanor King in the Family Division of the High Court. She dismissed the appeal but allowed the cross-appeal. In the reserved judgment it was clear that she considered DJ Million had erred in law and in balancing the relevant factors under s3 of the 1975 Act. Mrs Ilott appealed, but her appeal was such that not only was she seeking to appeal the dismissal of her claim but she was also requesting that her appeal on quantum be remitted to a judge in the Family Division of the High Court other than Mrs Justice Eleanor King.

The Court of Appeal permitted the appeal and remitted the quantum question. It held the judge at first instance had not erred in law. The correct question was whether, having considered the s3 factors, the lack of provision was unreasonable. There was no obligation to balance these factors or to explain why those factors resulted in the conclusion that no provision was unreasonable. This value judgment should not be interfered with unless plainly wrong. Further, there was no requirement on an adult child to show the deceased owed them a moral obligation or that there were other special circumstances in order to be successful in a claim under the 1975 Act.

Quantum – High Court and the Court of Appeal

Mrs Justice Parker dealt with the issue of quantum when the matter was remitted to the Family Division of the High Court. The award by DJ Million was meant to be a windfall. He had not taken into account that Mrs Ilott would only benefit from the first £16,000 as a result of the benefits system, unless she spent the total immediately, but he had not been provided with the material to make an assessment of the impact of any award on Mrs Ilott's benefits. Further, this information was not provided to Mrs Justice Parker either. Mrs Ilott's appeal was dismissed. It was not manifestly wrong for DJ Million to take the view that although Mrs Ilott and her husband had lived in difficult financial circumstances for a number of years, this did not warrant awarding a sum which would improve their circumstances.

Mrs Ilott appealed to the Court of Appeal, which was tasked with considering the correct approach to an award under the 1975 Act where the effect of the award would be to remove the claimant's entitlement to state benefits. It held that there were two fundamental errors committed by DJ Million which meant his judgment should be set aside. Firstly, he should have stated how he had limited the award to reflect Mrs Ilott's ability to live within her means and her lack of expectation, as this would then allow the court to consider whether the reductions were excessive. Secondly, he had to calculate the sum due for reasonable financial provision for Mrs Ilott's maintenance, yet it was unknown to him what the impact of the £50,000 award would be on her state benefits. In fact, the impact was such that she would lose more in state benefits than she would gain by the award. DJ Million had made a working assumption that the family would be disentitled to most of their state benefits but, as this was not verified, the logic of the award was undermined. The Court of Appeal reconsidered the s3 factors and awarded £143,000. This was to cover the cost of acquiring the property Mrs Ilott resided in under the right to buy scheme and the reasonable expense of acquiring it. Mrs Ilott was also given the option of a maximum capital sum of £20,000 to provide her with an immediate capital sum which would meet her further income needs.

Unfortunately for Mrs Ilott, the charities appealed the decision of the Court of Appeal.

Quantum – The Supreme Court

The Supreme Court allowed the appeal and restored the £50,000 award.

A few of the interesting points from Lord Hughes, who delivered the leading judgment with which the other six members of the judiciary agreed, are as follows:

- The s3 factors are often in tension with one another and they should all be considered to allow a single assessment to be made. There is not a s3 factor which can be ignored for the purpose of arriving at a hypothetical figure which may then be discounted. DJ Million had not erred in this respect.

The charities cross-appealed on the basis that, had the judge applied the law properly, he would have determined that no provision for Mrs Ilott was reasonable provision.

- It was not erroneous to take into account the nature of the relationship between Mrs Ilott and Mrs Jackson. DJ Million was entitled to find that there was a failure to make reasonable financial provision for Mrs Ilott and the nature of her relationship with Mrs Jackson would impact on what constituted reasonable financial provision.

- DJ Million did not fail to address the impact of an award on Mrs Ilott's state benefits. He had been provided with no materials on this issue. Mrs Ilott should have provided these if it was her case that this point was relevant. It appeared that DJ Million was either correct in distinguishing credits and benefits or, if he was incorrect, he had overestimated the impact the award would have on Mrs Ilott's benefits. In any event Mrs Ilott had not been disadvantaged.

- The items required by Mrs Ilott (her list included things such as essential white goods, basic carpeting, replacing broken beds etc) were needed for her household to function properly and as such fit within the maintenance concept. Replacement of essential household

items is the maintenance of daily living not an indulgence.

- The objective judgment is whether reasonable financial provision has been made, not whether the deceased acted unreasonably.

- In some circumstances, not those in the current case, the state support received may be greater than that which the testator can provide, so it may be reasonable for financial provision not to be made. The reasonableness of a decision is capable of being a factor considered within s3(1)(g) and sometimes s3(1)(d).

- Benefits are part of a claimant's resources and it is relevant to consider whether they will continue to be received.

- It is not correct to say that once a claimant qualifies under s1 and that claimant has a need for maintenance, that the testator's wishes are of no weight.

- The statutory power is to provide maintenance, not capital. Nonetheless, it will often be more appropriate, cheaper and convenient for provision of income to be by way of a lump sum from which income and capital can be drawn. Where housing is provided by way of maintenance it is more likely to be by way of a life interest instead of a capital sum.

Lady Hale also provided a short judgment. She sympathised with the difficult position DJ Million was in, noting that he had three options:

- to decline to make any order, there being several reasons which could have been provided for this, for example Mrs Ilott was self-sufficient, had no expectation of an inheritance, had not contributed to Mrs Jackson's wealth, had been a disappointment to her etc;

- to make an order which would give Mrs Ilott what she most needed and save the public purse the most money; or

- to do what he did.

This simply confirms the scope of the options available to DJ Million and the arduous nature of determining what constitutes reasonable financial provision.

The Court of Appeal was tasked with considering the correct approach to an award under the 1975 Act where the effect of the award would be to remove the claimant's entitlement to state benefits.

Conclusion for practitioners

Although this is the first time the highest court in England and Wales has considered the application of the 1975 Act, no great strides have been made. While there are some minor clarifications within the leading judgment, the Supreme Court steadfastly avoided the opportunity to prescribe in detail how the 1975 Act should operate in relation to claims by adult children. It has instead reiterated that there is a value judgment to be made when 1975 Act claims are considered.

This long-awaited decision does not assist practitioners in the way they may have hoped. It remains the case that when evaluating 1975 Act claims those operating in this field of law will largely be relying on what feels right in the circumstances, having applied the s3 factors. Unless the court suddenly becomes inclined to legislate through the backdoor it seems unlikely that any substantive rules will be established to address the difficulty of assessing 1975 Act claims by adult children. Lady Hale recognised the diversity of public opinion on this topic. In light of this judgment it appears that if considerable steps are to be taken Parliament will need to legislate accordingly. ■

Ilott v Mitson
[2017] UKSC 17, to be reported in a future edition of *WTLR*