Illott v The Blue Cross
[2017] UKSC 17

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Illott v The Blue Cross & Ors – Supreme Court Decision

In summary:

- 7-Judge Supreme Court unanimously overturns the decision of the Court of Appeal ([2015] EWCA Civ 797). Lord Hughes gives leading Opinion;

- Decision of DJ Million restored. Award of £50,000 made;

- Decision stresses that the judgment concerns only one kind of Claimant (adult child living independently) and whilst there may be some cross-over to other types of claim, they must be resolved on a case by case basis (para 3);

- Discussion on the concept of “maintenance” – important to remember that the statutory power is to provide for maintenance not to confer capital (para 15). All cases limited to maintenance will turn largely on the asserted needs of the claimant (para 19);

- The reasonableness of the deceased’s decisions are capable of being a factor for consideration (para 17). Re Coventry [1980] Ch 461 approved;

- Clarification of the “two stage approach” (paras 23 and 24). No need to apply to artificial an approach;

- Baroness Hale gives supplemental Opinion, criticising the current state of the law.
A Factual Recap

a. Mrs. Ilott made a claim under the Inheritance (Provision for Family & Dependants) Act 1975 challenging the will of her late mother (Mrs Jackson), who had left her £486,000 Estate to various charities. Mrs. Ilott was her only child and received nothing. Mrs Ilott had been estranged from her mother since she was 17, a total period of 26 years, and at the time of her claim lived with her husband and their 5 children in a council property on very limited means;

b. At first instance, DJ Million awarded Mrs. Ilott the sum of £50,000 from an estate worth nearly £500,000, out of which she had been awarded nothing, stating, inter alia:

- Mrs Ilott has limited financial resources and obvious financial needs, in that she is heavily reliant on state benefits to maintain her modest lifestyle and home;

- Mrs Jackson owed her daughter the ordinary family obligations of a mother towards her only child who was an independent adult;

- A daughter is entitled (indeed would be expected) to make a life with a partner of her choice and have a family of her own. She would reasonably hope that a parent would accept such a choice, and not blame her for it… it was, in my judgment, a harsh and unreasonable decision for Mrs Jackson to exclude her daughter from any consideration of financial provision because of her daughter’s decision, made at the age of 17, to make her future with a man who later became her husband;

- I am satisfied therefore that the rejection by the mother of her only child at the age of 17, and which she then maintained for the rest of her life, was unreasonable, and that has led to Mrs Jackson unreasonably excluding her daughter from any financial provision in her will, despite her daughter’s obviously constrained and needy financial circumstances and her daughter’s wish for and attempts at a reconciliation.
c. The emotional aspect of DJ Million’s decision is therefore clearly apparent;

d. The way in which the case at first instance was presented was poor. DJ Million was extremely polite; however he noted in his judgment that the case that was put forward was “unhelpful” and “ill thought out”;

e. The essence of the first instance decision was to get Mrs. Ilott off benefits by dint of the award.

f. This was overturned at appellate level by King J (as she then was). She held no award was appropriate (allowing an appeal by the charities who would otherwise have received the Estate).

g. The Court of Appeal allowed an appeal against this and remitted the matter back to the High Court to consider the appeal as to quantum. Parker J upheld the award of DJ Million.

h. As is well known, the Court of Appeal allowed the appeal and increased the quantum to £143,000, to enable the Appellant to purchase her housing association home.

Per Arden LJ (at 35 and 36):

The two fundamental errors in my judgment are these. First, at the end of para 67 of his judgment (see annex), 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. Parker J simply assumed that those were the reasons why DJ Million had rejected the appellant’s claim for a lump sum that would enable her to buy her home. 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. It was a situation in which reasons were required so that the appellant could consider whether the reductions were excessive (which might give her an arguable error for the purposes of any appeal), and it is of the essence of a judicial decision that adequate reasons are given on material matters. I deal below with the questions whether there should have been a reduction in the award because of her ability to live within her means or because of her lack of expectation.
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.

And at 60-63:

In my judgment, what the court has to do is to balance the claims on the estate fairly. There is no doubt that, if the claimant for whom reasonable financial provision needs to be made is elderly or disabled and has extra living costs, consideration would have to be given to meeting those. In my judgment, the same applies to the case where a party has extra financial needs because she relies on state benefits, which must be preserved. Ms Reed submits that the provision of housing would not do this. I disagree. The provision of housing would enable her both to receive a capitalised sum and to keep her tax credits. If those benefits are not preserved then the result is that achieved by DJ Million’s order in this case: there is little or no financial provision for maintenance at all.

The claim of the appellant has to be balanced against that of the Charities but since they do not rely on any competing need they are not prejudiced by what may be a higher award than the court would otherwise need to make.

In my judgment, the right course is to make an award of the sum of £143,000, the cost of acquiring the Property, plus the reasonable expenses of acquiring it. That would remove the need to pay rent though some of that money may be required for meeting the expenses that she will have as owner. As Ms Stevens-Hoare submits, having the Property will enable her to raise capital (by equity release) when she needs further income in the future.

In addition, I would add to the award a further sum to provide for a very small additional income to supplement her state benefits without the necessity of an equity release. If my Lords agree, I would provide that she has an option, exercisable by notice in writing to the first and second respondents within two months of the date of this order (or within such longer period as the appellant and first and second respondents may agree) to receive a capital sum not exceeding of £20,000 out of the estate for this purpose. According to the current Duxbury tables in At a Glance for 2015/6, the sum £20,000 would if invested give her £331 net income per year for the rest of her life. This is not a large amount because of the factors which weigh against her claim, particularly the fact that she is an adult child living independently, Mrs Jackson’s testamentary wishes and to a small extent the appellant’s estrangement from Mrs Jackson.
The Supreme Court Decision

1. The issues to be determined were stated as being:

   a. Whether the Court of Appeal was wrong to set aside the award made at first instance on the respondent's claim under the Inheritance (Provision for Family and Dependents) Act 1975.

   b. Whether, in deciding to re-exercise the court's discretion to make an award under the 1975 Act, the Court of Appeal erred in taking account of the factual position as at the date of the appeal rather than the date of the original hearing.

   c. Whether the Court of Appeal erred in its approach to the "maintenance" standard under the 1975 Act.

   d. Whether the Court of Appeal was wrong to structure an award under the 1975 Act in a way which allowed the respondent the preserve her entitlement to state benefits.

   e. Whether the Court of Appeal erred in its application of the balancing exercise required under the 1975 Act.

2. The judgment stresses at an early stage, no doubt with a view to the media reports at the time of the Court of Appeal decision, that since 1938 there has been a power for the court to modify a will or the intestacy provisions if satisfied that they do not make reasonable financial provision for a limited class of persons (para 1). At para 3, the judgment further makes clear that this case is concerned with one kind of claimant only, which is only one of the types of case which “may raise difficult individual questions… which have to be resolved on a case-by-case basis”. Some of the factors dealt with may also apply to other types of case than adult children living separately, but the court stresses that this decision is not a panacea review of all types of 1975 Act claims.

3. One of the features that commentators have been hoping for significant further guidance is in respect of the limitation for adult children (and all applicants other than spouses or other partners) to provision for maintenance (section 1(2)(b). The judgment considers
this deliberate legislative limitation from paragraph 12. The concept of maintenance is broad (para 14) but it does not extent to any or every thing it would be desirable for the claimant to have – it must import provision to meet the everyday expenses of living. The level of maintenance is flexible and falls to be assessed on the facts of each case (para 15). It is not limited to subsistence level, and need not necessarily be provided for by way of periodical payments, though it is by definition the provision of income rather than capital. Income from a Duxbury lump sum will very often be more appropriate. Provision of a lump sum for a vehicle to get to work might be an example of a lump sum. There is also no reason why the provision of housing should not be maintenance in some cases – in essence what the Court of Appeal had sought to do below in providing a sum to enable Mrs. Illott to purchase her property. However, para 15 goes on to note that the statutory power is to provide for maintenance and not to confer capital. “If housing is provided by way of maintenance, it is likely more often to be provided by… a life interest rather than a capital sum”.

4. At paragraph 16 et seq, the judgment analyses reasonable financial provision. It is not the right question to ask whether the deceased acted reasonably but to consider whether reasonable financial provision has been made. At para 17, the reasonableness of the deceased’s decisions are found undoubtedly to be capable of being a factor for consideration within section 3(1)(g) (any other matter) and sometimes 3(1)(d) (obligations and responsibilities). The correct test is that set out in re Coventry [1980] Ch 461. All cases limited to maintenance, and many others also, will turn largely on the asserted needs of the claimant (para 19). For spouses and civil partners, need is not the measure but will be very relevant if it exists. For all other claimants, need for maintenance, judged by the standard appropriate to the circumstances, is a necessary but not sufficient condition. Need plus relationship is not always enough – there needs to be something more (the “moral claim” in re Coventry, as explained as being the need for something more). Need is also not necessarily the measure of the order which ought to be made (at para 22).

5. In paragraphs 23 and 24, the judgment notes that it is conventional to consider a two-stage process: (1) has there been a failure to make reasonable financial provision; (2) if so, what order ought to be made. The judgment makes clear that the Act requires a broad brush approach to very variable personal and family circumstances. There is
nothing wrong with the setting out of the facts and then addressing both questions arising without repeating them. There should not normally be any occasion for a split hearing.

6. In applying these factors to the decision of the Court of Appeal, the Supreme Court held:

   a. That the first “fundamental error” was not an error. The Act requires a single assessment by the judge of what reasonable financial provision should be made in all the circumstances of the case (para 34), and does not require the fixing of some hypothetical standard of reasonable provision and then adding or reducing for variable factors. In light of the section 3 factors, some of which will be in tension, a single assessment of reasonable provision is to be made. It was not an error to take into account the nature of the relationship between Mrs. Illott and the deceased. This relationship will often be important. DJ Million, having diligently worked through the section 3 criteria was perfectly entitled to conclude that there was a failure of reasonable financial provision, but what reasonable provision would be was coloured by the nature of the relationship;

   b. The second “fundamental error” was also not an error. This related to the finding by the Court of Appeal that the Judge did not know the effect of an award of £50,000 would be on the state benefits, and that the award gave little or no benefit. The Supreme Court finds (at para 38) that the DJ did not so fail. He addressed the impact of benefits twice. The “real gravamen” of the criticism is said to be that the award had little or no value because of the impact on benefits. If that were so, and if done in ignorance of the true position, that might be a legitimate error of principle. But the award was neither of little or no value or done in ignorance.

7. The Supreme Court addressed in terms (at para 45) a troubling aspect of the decision of the Court of Appeal at para 60, which was that taking its analysis literally, would indicate that dependence on benefits increased the needs of the claimant, as disability was likely to do. This was an extremely troubling aspect of the decision below, and has rightly been criticised as apparently creating as a new factor or class of claimant those
who were on benefits. “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 [the] financial position”.

8. In considering the award that the Court of Appeal had made, the Supreme Court held that the right order was likely to be a life interest in the necessary sum, rather than an outright payment, but there was no discussion of this. The decision of the Court of Appeal also gave little if any weight to a quarter of a century of estrangement, or to the testator’s very clear wishes (at 46). The view that these factors counted for little, and the fact that the charities had no expectation of benefit, should be treated with caution. It cannot be ignored that an award under the Act is at the expense of those whom the testator had intended to benefit. The wishes of the testator can be overridden, but remain part of the circumstances of the case.

Analysis

9. In essence, this decision re-states existing law and overturns a decision of the Court of Appeal which strayed too far into creative territory. The creation of a special category of claimant as being those on benefits, on a par with those who were disabled, is rightly deprecated, as is the brusque dismissal both of the testator’s wishes and the interests of the beneficiaries. These are all factors, and need to be considered in the circumstances of the case.

10. Perhaps of most importance is the emphasis given to life interests, rather than outright lump sums, in the context of maintenance. The Supreme Court took the view that in the event that housing provision was to be made in this case, a life interest in the sum would have been the correct outcome. However, as DJ Million did not fall into error, his Order stands. The criticisms made of the District Judge were surprising when the Court of Appeal judgment was delivered, and for that reason much of the analysis of the Supreme Court deals with the analysis to be applied.

11. Illott does not, and does not purport, radically to re-shape the law relating to 1975 Act claims. Rather, it re-states existing principle, clarifies the permissible approach to the two-stage test, and confirms what was already considered to be the case in respect of maintenance prior to the Court of Appeal decision, though clarifying the use of lump
sum and Duxbury-type awards. The deprecation of the approach to benefits as being anything other than an illustration of financial circumstances is however highly important, as is the confirmation that estrangement and the wishes of the testator remain important factors to be considered.

12. Inheritance Act claims still fall to be considered on their particular facts, and Illott does little to change this save for the clear indication that, if housing needs are to be met, this is likely to be by way of a life interest and not an outright lump sum.

Postscript

13. Baroness Hale, with whom Lords Kerr and Wilson agreed, added a postscript to the judgment. In this, she raised concerns with the legislation. Her judgment is an illuminating consideration of the legislative history leading up to the 1975 Act. She notes the wide range of public opinion about the circumstances in which adult descendants ought or ought not to be able to make a claim on an estate which would otherwise go elsewhere (para 58). The problem with the present law is that it gives virtually no help in deciding how to evaluate the claims or how to balance them with other claims on the estate. The only guidance given is the threshold question of whether reasonable financial provision is made; if it does not, that the actual provision to be ordered is limited to what is reasonable for the claimant’s maintenance (unless the applicant is a spouse or civil partner) and in deciding those questions, the court must have regard to section 3 (para 60).

14. At paragraph 63, Baroness Hale notes the public interest in family members discharging their responsibilities towards one another so that these do not fall on the state – not a factor listed in section 3, but one applied elsewhere in family law. What, she asks, rhetorically, is the relevance of the fact that an applicant’s household is very largely dependent on state benefits to the threshold question, let alone to the quantification of any order to be made? Faced with the facts of this case, there were probably at least three very different solutions:

   a. Make no order, as the applicant was self-sufficient and had no expectation of inheriting; there is no recognized public interest in law in expecting or obliging parents to
support their adult children so as to save money. Had the claim been dismissed by the DJ, it was very unlikely that that decision would have been reversed on appeal;

b. Make an order having the dual benefit of giving the applicant what she most needed and saving the public purse the most money – which is what in effect the Court of Appeal did. “Housing is undoubtedly one of the first things that anyone needs for her maintenance, along with food and fuel”. But it is difficult to reconcile the grant of an absolute interest in real property with the concept of reasonable provision for maintenance – buying it and settling it on her for life would be more compatible;

c. Make the Order that was made.

15. It appears that Baroness Hale wishes to highlight the difficulty that the Act poses for the courts, with the varying outcomes that are available, and that the current state of the law is unsatisfactory as there is no guidance as to the factors to be taken into account in deciding whether an adult child is deserving or undeserving of reasonable maintenance. However, as it was open to DJ Million to make the order he did, it should not be disturbed.