FAMILY PROVISION GOES TO THE SUPREME COURT

The Supreme Court has given permission to appeal to the charities involved in *Ilott v Mitson* [2015] EWCA Civ 797, [2015] 2 FLR 1409. Unless the case is settled before the hearing, it is believed that it will prompt substantive consideration of the Inheritance (Provision for Family and Dependants) Act 1975 at the highest judicial level for the first time.

Ilott involved an adult daughter (Heather) who was excluded from the will of her mother (Mrs Jackson) in favour of the Blue Cross, the Royal Society for the Protection of Birds and the Royal Society for the Prevention of Cruelty to Animals. Mother and daughter had been estranged for some 26 years after Heather left home at the age of 17 to live with a man whom she later married. Heather and her husband had five children and lived in strained financial circumstances but Mrs Jackson had written a letter explaining her reasons for 'disinheriting' her daughter and Heather was aware that she would receive nothing before Mrs Jackson died.

The Court of Appeal held that Judge Million had erred in awarding Heather only £50,000 out of the £486,000 estate. Arden and Ryder LJJ and Sir Colin Ryder substituted an award of £143,000 to enable her to purchase the housing association property in which she and her family were living (in addition to the reasonable costs of the purchase) and an option to claim up to a further £20,000 to supplement her state benefits (see B Sloan, 'The "Disinherited" Daughter and the Disapproving Mother' [2016] *Cambridge Law Journal* (forthcoming) for further discussion).

It is important to note that the judge's initial conclusion that Mrs Jackson's will had failed to make 'reasonable financial provision' for her maintenance (as required by s 1 of the 1975 Act) can no longer be challenged. Permission to appeal that finding to the Supreme Court after it was ultimately upheld by the Court of Appeal ([2011] EWCA Civ 346, [2012] 2 FLR 170) was denied in 2011. Heather will therefore receive something from the estate irrespective of the Supreme Court's decision and the issues in the case are whether the Court of Appeal erred: in setting aside Judge Million's determination of the appropriate award; in its approach to the maintenance standard; and in structuring its award to enable Heather to retain her state benefits.

The Court of Appeal made two cogent criticisms of Judge Million's approach. The first was the fact that the judge stated that the award should be 'limited' because of Heather's lack of expectation of provision and her ability to live within her current means but wrongly omitted to explain 'what the award might otherwise have been and to what extent it was limited by the matters in question' (para [35]). The second criticism was the judge's failure to verify what effect his award would have on the applicant's entitlement to state benefits, simply assuming that a large capital payment (even including the one he made) would disentitle the family to most if not all of their benefits.

Arden LJ did, however, make some questionable assertions in the course of exercising the relevant discretion afresh. She noted that the charities did not have any relevant resources or needs and that anything they received from the estate was a windfall. In addition, they were not held to have any expectation of such a benefit since Mrs Jackson had no involvement with them during her lifetime. It is certainly difficult to equate the needs of charities with those of people but it surely goes too far to suggest (as Arden LJ did) that the charities were 'not prejudiced' by a higher award (para

[61]). Her reluctance specifically to consider testamentary freedom as a principle, and her corresponding preference to regard the maintenance limitation as itself providing sufficient protection for testamentary freedom, might also be worthy of challenge.

The Court of Appeal's conclusion, however, did not deserve the hysteria with which it was greeted in some quarters and at a macro level did not represent a significant departure from previous judicial approaches to the Act. Throughout the Act's lifetime, it has been a calculated risk to exclude from a will an adult child who might be said to have a need for maintenance, even if s/he has literally been able to survive without support from the now-deceased parent (see S Douglas, 'Estranged Children and their Inheritance' (2016) 132 *Law Quarterly Review* 20). The possible liability to provide for adult children with maintenance needs is a fundamental principle underpinning the Act, and it has been established that neither disapproval of lifestyle (*Espinosa v Bourke* [1999] 1 FLR 747 (CA)) nor estrangement (*Gold v Curtis* [2005] WTLR 673 (Ch)) will absolutely bar claims.

The relationship between family provision applications and state benefits raises difficult policy issues (see, eg B Sloan, 'Informal Care and Private Law: Governance or a Failure Thereof?' (2015) 1 *Canadian Journal of Comparative and Contemporary Law* 275 for discussion of the balance between state provision and 'private law' mechanism such as the 1975 Act in supporting informal carers). In the context of provision on divorce, one of Baroness Hale's reasons for caution about the recognition of marital agreements purporting to relieve former spouses from their liability to support each other was that such recognition might allow a wife 'to cast the burden of supporting her husband onto the state' (*Radmacher v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900, para [190]). But courts have previously been reluctant to consider the availability of benefits as a reason to limit family provisions claims (*Re E, E v E* [1966] 1 WLR 709 (Ch); *Re Collins* (dec'd) [1990] Fam 56, 61–62) and if the role of the 1975 Act were not to supplement such benefits (at in some cases) it would often serve little purpose.

It is arguably a courageous decision for the charities involved to pursue a further appeal in this long-running case, not least in light of the RSPCA's negative experience in seeking to uphold the will in *Gill v Woodall* [2010] EWCA Civ 1430, [2011] Ch 380. Both charities and practitioners will await the outcome in *Ilott* with interest and no small degree of apprehension.

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