Hilary Term
[2017] UKSC 17
On appeal from: [2015] EWCA Civ 797

JUDGMENT

Ilott (Respondent) *v* The Blue Cross and others (Appellants)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Kerr
Lord Clarke
Lord Wilson
Lord Sumption
Lord Hughes

JUDGMENT GIVEN ON

15 March 2017

Heard on 12 December 2016

Appellants
Penelope Reed QC
Hugh Cumber

(Instructed by Wilsons Solicitors LLP)

Respondent
Brie Stevens-Hoare QC
John Collins
Constance McDonnell
(Instructed by Wright Hassall)

LORD HUGHES: (with whom Lord Neuberger, Lady Hale, Lord Kerr, Lord Clarke, Lord Wilson and Lord Sumption agree)

1. Unlike some other systems, English law recognises the freedom of individuals to dispose of their assets by will after death in whatever manner they wish. There are default succession rules in the event of intestacy, but by definition those only come into play if the deceased left no will. Otherwise the law knows of no rule of automatic succession or forced heirship. To this general rule, the statutory system of family provision imposes a qualification. It has provided since 1938 for the court to have power in defined circumstances to modify either the will or the intestacy rules if satisfied that they do not make reasonable financial provision for a limited class of persons. That power was first introduced by the Inheritance (Family Provision) Act 1938 ("the 1938 Act"). The present statute is the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act").

2. The key features of the operation of the 1975 Act are four. First, it stipulates no automatic provision; rather the will (or the intestacy rules) apply unless a specific application is made to, and acceded to by, the court and a specific order for provision is made. Second, only a limited class of persons may make such an application; they are confined to spouses and partners (civil or de facto), former spouses and partners, children, and those who were actually being maintained by the deceased at the time of death. Third, all but spouses and civil partners who were in that relationship at the time of death can claim only what is needed for their maintenance; they cannot make a claim on the general basis that it was unfair that they did not receive any, or a larger, slice of the estate. Those three features are laid down expressly in the 1975 Act. The fourth feature is well established by case law both under this Act and its predecessor of 1938. The test of reasonable financial provision is objective; it is not simply whether the deceased behaved reasonably or otherwise in leaving the will he did, or in choosing to leave none. Although the reasonableness of his decisions may figure in the exercise, that is not the crucial test.

3. The present case concerns one kind of claimant, namely an adult child who has lived quite independently of her parent, the deceased testator, for many years, but who is in straitened financial circumstances. That is only one of the types of case which may raise difficult individual questions under the 1975 Act, which have to be resolved on a case-by-case basis. Applications by spouses may do so, whether living with the deceased at the time of death or separated or divorced. Some cases involve difficult balancing of competing claims by several persons upon limited estates. Yet others involve assessing the circumstances in which the deceased was supporting the claimant in some way up to the time of his death; those circumstances may give rise to a claim that future maintenance is reasonably required, or they may

demonstrate that support was given in circumstances in which there is no obligation to continue it after death. Some of the factors inevitably dealt with in this judgment may apply also to types of case other than those of adult children living separately from the deceased, but there is no occasion for this court to attempt to meet every difficulty to which claims for family provision may give rise.

The facts of the present case

4. The testator, Mrs Jackson, was widowed after only four years of marriage and when expecting her only child, a daughter, now Mrs Ilott. In 1978, when Mrs Ilott was 17, she left home secretly to live with her boyfriend, of whom Mrs Jackson did not approve. There followed a lifelong estrangement between mother and daughter which lasted 26 years until the former's death in 2004 at the age of 70. Mrs Ilott married the man she left home to live with, without telling her mother at the time, although the latter learned of it afterwards. They are still together, and have had five children. They have lived their entire married lives independent of any financial connection whatever with Mrs Jackson, and for much the greatest part of that time in complete isolation from her.

5. District Judge Million reviewed in some detail the evidence of the very limited contacts which mother and daughter had over the extended intervening years. Mrs Jackson had kept a diary and Mrs Ilott gave her own detailed account. There had been three attempts at reconciliation, but all had foundered. The first, after the birth of the first of Mrs Ilott's children in Spring 1983, had lasted the longest. It had been fostered by Mr Ilott's mother, and had resulted in Mrs Jackson visiting the new mother in hospital and in several subsequent telephone calls between them. However, these had not in the main been amicable and they ended after an unpleasant row between Mr Ilott and Mrs Jackson, as to which the District Judge held that Mrs Ilott's evidence about what her husband had said was deliberately evasive. Later conversations between mother and daughter occurred many years later in 1994 and 1999 after chance encounters in public places, but these were very short lived and also failed to establish significant common ground. District Judge Million went on to find that Mrs Jackson was capricious and unfair in many of the criticisms of Mrs Ilott recorded in letters, and that her decision to exclude her altogether from her estate was harsh and unreasonable. He found that the hurt felt by Mrs Jackson at the original and sustained rupture of her family, and what she saw as being deprived of her grandchildren, was so entrenched that little short of rejection by Mrs Ilott of her husband would have satisfied her; a written apology sent at one stage by Mrs Ilott did not meet her needs. Equally, he found that Mrs Ilott and her husband contributed to some of the difficulties in sustaining a reconciliation. It will be necessary later to refer to the limits to the relevance of these findings.

6. Whatever the rights and wrongs of the family feud may have been, there is no doubt that it was sustained for a quarter of a century and was the reason why Mrs Jackson decided not to make any provision for her daughter in her will. This was not a decision taken in haste. She had made it at least as early as Spring 1984, when she made a will and recorded a letter of wishes. This was at a time when there was some contact between mother and daughter, during the first attempt at reconciliation and about two months before the row which ended it. The side letter of wishes stated her decision as follows, after referring to Mrs Ilott's initial departure from home in 1978:

> "She did not get in touch with me and I heard from her husband's parents that she had a baby boy. When I heard about this, I visited her in hospital and took flowers and brought up her perambulator and other presents. However, she made herself very unpleasant and wished to have nothing to do with me. Therefore she receives nothing from me at my death."

There is no reason to think that Mrs Ilott was aware of this 1984 will at the time that it was made, nor to suppose that it had anything to do with the breakdown of the then fragile attempt at reconciliation. But the decision remained firm and Mrs Jackson reiterated it in 2002 when she made her last will, and again left a side letter. It similarly stated her settled conclusion that no provision should be made for Mrs Ilott, saying that she felt no moral or financial obligation towards her in view of what had happened, and it instructed her executors to resist any claim which Mrs Ilott might make. Mrs Ilott's evidence made clear that her mother told her of this decision and the District Judge found that she and her family had managed their lives for many years without any expectation of benefit from the estate. Apart from a modest legacy to a benevolent association connected with her late husband's employment, Mrs Jackson's will left her estate to charities with which she had had no particular connection during her lifetime, but which represented her freely made and considered choice of beneficiaries. The estate, of which the largest single component was a house in the home counties, was worth in round figures £486,000.

7. Mrs Ilott's financial circumstances were conservatively described by the District Judge as modest. The family lived in a house rented from a Housing Association. At the time of his decision, four of the children were living at home, one of them, aged 20, in work. Mrs Ilott had elected since the birth of the first of their children to remain at home and was not employed except as her husband's bookkeeper for £240 pa. Her husband had intermittent work as a supporting actor and earned a little over £4,100 pa net after charging some expenses such as car costs which brought some benefit in kind. Leaving aside any small contribution from the 20 year old son, the rest of the family income was in the form of child benefit (£1,878) and working tax credits (£8,112). The family was also entitled to housing benefit and council tax benefit, together worth about £5,100 pa. The District Judge

assessed the net annual income, after including the limited benefit in kind, at £20,387. He then allowed for some limited, and unspecified, earning capacity in Mrs Ilott, at least in part time work, although in the past her decision to remain at home for the children was perfectly understandable.

8. The family had lived on that or similar income for many years. Mrs Ilott was not insolvent. The family had a small sum by way of savings (about £4,000). They lived within their means. But the clear evidence was that she and her family were distinctly limited in what they could do. The household equipment was all old and much of it worn out, but they could not afford to replace it as necessary. The car had cost £245 and kept breaking down. The carpets and decoration needed renewal but they could not provide for this. They had never been able to afford a family holiday. They could not contemplate, for example, music or sports lessons for the children.

9. Before both the Court of Appeal and this court it was common ground that some of the benefits received by Mrs Ilott and her family were subject to a means test based on available savings or capital. Both housing benefit and council tax benefit are not payable if there are savings in excess of £16,000, other than in the form of the capital value of the family home. Neither working tax credit nor child benefit is similarly affected by capital. As will be seen, the incidence of benefits was central to the re-evaluation of the claim which the Court of Appeal made.

10. Mrs Ilott was entitled to buy her present home at a concessionary price, as a sitting tenant. The price at the time of the hearing before the District Judge was £186,000, but by the time of the Court of Appeal judgment now under appeal it had fallen to £143,000.

The statutory framework

11. The 1975 Act, as it stood at the time of Mrs Jackson's death in 2004 and omitting subsequent amendments to include civil partners as qualified claimants and to give further definition to those whom the deceased was maintaining at the time of death, provided as follows.

> "1. Application for financial provision from deceased's estate
>
> (1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons -

(a) the wife or husband of the deceased;

(b) a former wife or former husband of the deceased who has not remarried;

(ba) any person (not being a person included in paragraph (a) or (b) above) to whom subsection (1A) below applies;

(c) a child of the deceased;

(d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;

(e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;

that person may apply to the court for an order under section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.

(1A) This subsection applies to a person if the deceased died on or after 1 January 1996 and, during the whole of the period of two years ending immediately before the date when the deceased died, the person was living -

(a) in the same household as the deceased, and

(b) as the husband or wife of the deceased.

(2) In this Act 'reasonable financial provision' -

(a) in the case of an application made by virtue of subsection (1)(a) above by the husband or wife of the deceased (except where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing), means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance;

(b) in the case of any other application made by virtue of subsection (1) above, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

(3) [Supplemental provisions relating to persons treated as being maintained by the deceased]

2. Powers of court to make orders

(1) Subject to the provisions of this Act, where an application is made for an order under this section, the court may, if it is satisfied that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant, make any one or more of the following orders -

(a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;

(b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified;

(c) an order for the transfer to the applicant of such property comprised in that estate as may be so specified;

(d) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified;

(e) an order for the acquisition out of property comprised in that estate of such property as may be so specified and for the transfer of the property so acquired to the applicant or for the settlement thereof for his benefit;

(f) an order varying any ante-nuptial or post-nuptial settlement (including such a settlement made by will) made on the parties to a marriage to which the deceased was one of the parties, the variation being for the benefit of the surviving party to that marriage, or any child of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage;

(2) [supplemental provisions for the form of periodical payments orders]

(3) [allows the court to order part of the estate to be set aside to meet periodical payments orders]

(4) An order under this section may contain such consequential and supplemental provisions as the court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between one beneficiary of the estate of the deceased and another and may, in

particular, but without prejudice to the generality of this subsection -

(a) order any person who holds any property which forms part of the net estate of the deceased to make such payment or transfer such property as may be specified in the order;

(b) vary the disposition of the deceased's estate effected by the will or the law relating to intestacy, or by both the will and the law relating to intestacy, in such manner as the court thinks fair and reasonable having regard to the provisions of the order and all the circumstances of the case;

(c) confer on the trustees of any property which is the subject of an order under this section such powers as appear to the court to be necessary or expedient.

3. Matters to which court is to have regard in exercising powers under section 2

(1) Where an application is made for an order under section 2 of this Act, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say -

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;

(b) the financial resources and financial needs which any other applicant for an order under

section 2 of this Act has or is likely to have in the foreseeable future;

(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

(d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;

(e) the size and nature of the net estate of the deceased;

(f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;

(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

(2) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(a) or 1(1)(b) of this Act, the court shall in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to -

(a) the age of the applicant and the duration of the marriage;

(b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family;

and, in the case of an application by the wife or husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.

(2A) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(ba) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to -

(a) the age of the applicant and the length of the period during which the applicant lived as the husband or wife of the deceased and in the same household as the deceased;

(b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.

(3) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(c) or 1(1)(d) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the manner in which the applicant was being or in which he might expect to be educated or trained, and where the application is made by virtue of section 1(1)(d) the court shall also have regard -

(a) to whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and the basis

upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;

(b) to whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child;

(c) to the liability of any other person to maintain the applicant.

(4) [additional considerations applicable to applications made under section 1(1)(e) by persons being maintained by the deceased.]

(5) In considering the matters to which the court is required to have regard under this section, the court shall take into account the facts as known to the court at the date of the hearing.

(6) In considering the financial resources of any person for the purposes of this section the court shall take into account his earning capacity and in considering the financial needs of any person for the purposes of this section the court shall take into account his financial obligations and responsibilities."

Maintenance

12. The concept of "reasonable financial provision" is thus, by the closing words of section 1(1), made central to the jurisdiction to depart from the will or intestacy rules, as the case may be. In the case of current spouses or civil partners, subsections 1(2)(a) and (aa) say that reasonable financial provision is what it would be reasonable for the applicant to receive, whether or not required for maintenance. The supplementary provisions of section 3(2) add for applicants in that limited class the direction to the court to have regard to the provision that the spouse or civil partner might have been expected to obtain in the event of divorce or dissolution, so that the assessment of this kind of claim may well be an exercise similar to that undertaken by the family court on an application for financial remedies after divorce or dissolution with, of course, the difference that the other spouse or partner is now dead. In the case of all other applicants, however, section 1(2)(b) makes clear that

reasonable financial provision means such provision as it would be reasonable for the applicant to receive for maintenance.

13. This limitation to maintenance provision represents a deliberate legislative choice and is important. Historically, when family provision was first introduced by the 1938 Act, all claims, including those of surviving unseparated spouses, were thus limited. That demonstrates the significance attached by English law to testamentary freedom. The change to the test in the case of surviving unseparated spouses was made by the 1975 Act, following a consultation and reports by the Law Commission: Law Com No 52 (22 May 1973) and Law Com No 61 (31 July 1974). The latter report made it clear that the recommendation was designed not to introduce, even in the case of surviving present spouses, a general power to re-write the testator's will, but rather to bring provision for such spouses into line with the developing approach of the family court. That court had by then relatively recently acquired expanded powers to make lump sum and property adjustment orders, which were not limited to maintenance provision but increasingly recognised other factors such as the length of the marriage, the contributions to the family and so on (see section 25 Matrimonial Causes Act 1973). The mischief to which the change was directed was the risk of a surviving spouse finding herself in a worse position than if the marriage had ended by divorce rather than by death. For claims by persons other than spouses the maintenance limitation was to remain, and has done so. See in particular paras 14, 16, 19 and 24.

14. The concept of maintenance is no doubt broad, but the distinction made by the differing paragraphs of section 1(2) shows that it cannot extend to any or every thing which it would be desirable for the claimant to have. It must import provision to meet the everyday expenses of living. *In re Jennings, deceased* [1994] Ch 286 was an example of a case where no need for maintenance existed. The claimant was a married adult son living with his family in comfortable circumstances, on a good income from two businesses. The proposition that it would be reasonable provision for his maintenance to pay off his mortgage was, correctly, firmly rejected - see in particular at 298F. The summary of Browne-Wilkinson J in *In re Dennis, deceased* [1981] 2 All ER 140 at 145-146 is helpful and has often been cited with approval:

> "The applicant has to show that the will fails to make provision for his maintenance: see *In re Coventry (deceased)* … [1980] Ch 461. In that case both Oliver J at first instance and Goff LJ in the Court of Appeal disapproved of the decision in *In re Christie (deceased)* … [1979] Ch 168, in which the judge had treated maintenance as being equivalent to providing for the well-being or benefit of the applicant. The word 'maintenance' is not as wide as that. The court has, up until now, declined to define the exact meaning of the word 'maintenance' and I am certainly not going to depart from that approach. But in my

> judgment the word 'maintenance' connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. The provision that is to be made is to meet recurring expenses, being expenses of living of an income nature. This does not mean that the provision need be by way of income payments. The provision can be by way of a lump sum, for example, to buy a house in which the applicant can be housed, thereby relieving him pro tanto of income expenditure. Nor am I suggesting that there may not be cases in which payment of existing debts may not be appropriate as a maintenance payment; for example, to pay the debts of an applicant in order to enable a him to continue to carry on a profit-making business or profession may well be for his maintenance."

Thus in that case a claim against a large estate by an adult son failed when it was put as a claim for a capital sum to meet the capital transfer tax payable on a sizeable gift made to the claimant by the deceased during his lifetime, which gift the former had wasted away. The judge made the assumption, perhaps generously to the claimant, that bankruptcy would be likely if such a legacy were not directed, but that did not make the suggested sum provision for maintenance; the claimant was well able to work, despite a chequered history of drifting from occupation to occupation, and even if bankrupt was well capable of maintaining himself.

15. The level at which maintenance may be provided for is clearly flexible and falls to be assessed on the facts of each case. It is not limited to subsistence level. Nor, although maintenance is by definition the provision of income rather than capital, need it necessarily be provided for by way of periodical payments, for example under a trust. It will very often be more appropriate, as well as cheaper and more convenient for other beneficiaries and for executors, if income is provided by way of a lump sum from which both income and capital can be drawn over the years, for example on the *Duxbury* model familiar to family lawyers (see *Duxbury v Duxbury (Note)* [1992] Fam 62). Lump sum orders are expressly provided for by section 2(1)(b). There may be other cases appropriate for lump sums; the provision of a vehicle to enable the claimant to get to work might be one example and, as will be seen, the present case affords another. 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.

Reasonable financial provision

16. The condition for making an order under the 1975 Act is that the will, or the intestacy regime, as the case may be, does not "make reasonable financial provision" for the claimant (section 1(1)). Reasonable financial provision is, by section 1(2), what it is "reasonable for [the claimant] to receive", either for maintenance or without that limitation according to the class of claimant. These are words of objective standard of financial provision, to be determined by the court. The Act does not say that the court may make an order when it judges that the deceased acted unreasonably. That too would be an objective judgment, but it would not be the one required by the Act.

17. Nevertheless, the reasonableness of the deceased's decisions are undoubtedly capable of being a factor for consideration within section 3(1)(g), and sometimes section 3(1)(d). Moreover, there may not always be a significant difference in outcome between applying the correct test contained in the Act, and asking the wrong question whether the deceased acted reasonably. If the will does not make reasonable financial provision for the claimant, it may often be because the deceased acted unreasonably in failing to make it. For this reason it is very easy to slip into the error of applying the wrong test. It is necessary for courts to be alert to the danger, because the two tests will by no means invariably arrive at the same answer. The deceased may have acted reasonably at the time that his will was made, but the circumstances of the claimant may have altered, for example by supervening chronic illness or incapacity, and the deceased may have been unaware of the full circumstances, or unable to make a new will in time. *In re Hancock, deceased* [1998] 2 FLR 346 illustrates another possibility. The deceased had acted entirely reasonably in leaving his business land to those of his children who were active in the business, but after his death part of the land acquired a development value six times its probate assessment, and, that being the case, there was a failure to make reasonable provision for another daughter who was in straitened circumstances. Thus there can be a failure to make reasonable financial provision when the deceased's conduct cannot be said to be unreasonable. The converse situation is still clearer. The deceased may have acted unreasonably, indeed spitefully, towards a claimant, but it may not follow that his dispositions fail to make reasonable financial provision for that claimant, especially (but not only) if the latter is one whose potential claim is limited to maintenance. In *In re Jennings*, for example, the deceased had unreasonably failed, throughout the minority of his son, the claimant, to discharge his maintenance obligations towards him. Many might say, as indeed the trial judge

did, that this failure imposed an obligation on the deceased belatedly to provide for his son. But by the time of his death many years later the son had made his own successful way in the world and stood in no need of maintenance; his claim accordingly failed, correctly, in the Court of Appeal.

18. The right test was well set out by Oliver J in *In re Coventry* [1980] Ch 461 at 474-475 in a passage which has often been cited with approval since:

> "It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. Subject to the court's powers under the Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession. In order to enable the court to interfere with and reform those dispositions it must, in my judgment, be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant - and that means, in the case of an applicant other than a spouse for that applicant's maintenance. It clearly cannot be enough to say that the circumstances are such that if the deceased had made a particular provision for the applicant, that would not have been an unreasonable thing for him to do and therefore it now ought to be done. The court has no carte blanche to reform the deceased's dispositions or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the deceased's position."

19. Next, all cases which are limited to maintenance, and many others also, will turn largely upon the asserted needs of the claimant. It is important to put the matter of needs in its correct place. For current spouses and civil partners (section 1(2)(a) and (aa)), need is not the measure of reasonable provision, but if it exists will clearly be very relevant. For all other claimants, need (for maintenance rather than for anything else, and judged not by subsistence levels but by the standard appropriate to the circumstances) is a necessary but not a sufficient condition for an order. Need, plus the relevant relationship to qualify the claimant, is not always enough. In *In re Coventry* the passage cited above was followed almost immediately by another much-cited observation of Oliver J:

> "It cannot be enough to say 'here is a son of the deceased; he is in necessitous circumstances; there is property of the deceased

> which could be made available to assist him but which is not available if the deceased's dispositions stand; therefore those dispositions do not make reasonable provision for the applicant.' There must, as it seems to me, be established some sort of moral claim by the applicant to be maintained by the deceased or at the expense of his estate beyond the mere fact of a blood relationship, some reason why it can be said that, in the circumstances, it is unreasonable that no or no greater provision was in fact made."

20. Oliver J's reference to moral claim must be understood as explained by the Court of Appeal in both *In re Coventry* itself and subsequently in *In re Hancock*, where the judge had held that there was no moral claim on the part of the claimant daughter. There is no requirement for a moral claim as a sine qua non for all applications under the 1975 Act, and Oliver J did not impose one. He meant no more, but no less, than that in the case of a claimant adult son well capable of living independently, something more than the qualifying relationship is needed to found a claim, and that in the case before him the additional something could only be a moral claim. That will be true of a number of cases. Clearly, the presence or absence of a moral claim will often be at the centre of the decision under the 1975 Act.

21. Oliver J's reference to necessitous circumstances not by themselves always being sufficient is illustrated by *Cameron v Treasury Solicitor* [1996] 2 FLR 716. The claimant was the former wife of the deceased. She had been divorced from him 19 years before his death and their matrimonial finances had been settled by a lump sum paid to her as a clean break. There had been no financial relationship between them for the next 19 years, although they had remained in touch. The fact that she was in necessitous circumstances was held not to create any obligation on him to provide for her from his estate; that there was no other claimant and his small estate passed as bona vacantia to the Crown did not alter the fact that their personal and financial relationship was long in the past. Thus cases of long estrangement may, according to the judge's assessment of the particular facts, be an example of the proposition that needs are not always enough to justify a claim under the Act. In most cases of clean break matrimonial settlement, the family court order will these days incorporate, as often as not by consent, a direction under section 15 that neither spouse shall be entitled to make any claim under the 1975 Act from the estate of the other.

22. Nor, if the conclusion is that reasonable financial provision has not been made, are needs necessarily the measure of the order which ought to be made. It is obvious that the competing claims of others may inhibit the practicability of wholly meeting the needs of the claimant, however reasonable. It may be less obvious, but is also true, that the circumstances of the relationship between the deceased and the claimant may affect what is the just order to make. Sometimes the relationship will

have been such that the only reasonable provision is the maximum which the estate can afford; in other situations, the provision which it is reasonable to make will, because of the distance of the relationship, or perhaps because of the conduct of one or other of the parties, be to meet only part of the needs of the claimant.

23. It has become conventional to treat the consideration of a claim under the 1975 Act as a two-stage process, viz (1) has there been a failure to make reasonable financial provision and if so (2) what order ought to be made? That approach is founded to an extent on the terms of the Act, for it addresses the two questions successively in, first, section 1(1) and 1(2) and, second, section 2. In *In re Coventry* at 487 Goff LJ referred to these as distinct questions, and indeed described the first as one of value judgment and the second as one of discretion. However, there is in most cases a very large degree of overlap between the two stages. Although section 2 does not in terms enjoin the court, if it has determined that the will or intestacy does not make reasonable financial provision for the claimant, to tailor its order to what is in all the circumstances reasonable, this is clearly the objective. Section 3(1) of the Act, in introducing the factors to be considered by the court, makes them applicable equally to both stages. Thus the two questions will usually become: (1) did the will/intestacy make reasonable financial provision for the claimant and (2) if not, what reasonable financial provision ought now to be made for him?

24. There may be some cases in which it will be convenient to separate these questions, particularly if there is an issue whether there was any occasion for the deceased to make any provision for the claimant. But in many cases, exactly the same conclusions will both answer the question whether reasonable financial provision has been made for the claimant and identify what that financial provision should be. In particular, questions arising from the relationship between the deceased and the claimant, questions relating to the needs of the claimant, and issues concerning the competing claims of others, are all equally applicable to both matters. The Act plainly requires a broad brush approach from the judge to very variable personal and family circumstances. There can be nothing wrong, in such cases, with the judge simply setting out the facts as he finds them and then addressing both questions arising under the Act without repeating them. Nor should there normally be any occasion for a split hearing. Moreover, Goff LJ's observations ought not to be thought to mean that the approach of an appeal court should differ as between the two parts of the process. Whether best described as a value judgment or as a discretion (and the former is preferable), both stages of the process are highly individual in every case. The order made by the judge ought to be upset only if he has erred in principle or in law. An appellate court will be very slow to interfere and should never do so simply on the grounds that its judge(s) would have been inclined, if sitting at first instance, to have reached a different conclusion. The well-known observations of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360 esp at 1373-1374 are directly in point. It is to "kill the parties with kindness" to permit marginal appeals in cases which are essentially individual value judgments such as

those under the 1975 Act should be. The present case, as it happens, is an example of much to be regretted prolongation, and presumably expensive prolongation, of the forensic process.

25. Submissions were made in the present case as to the date at which the facts fall to be assessed. The answer is given by section 3(5). Where a court has to assess whether reasonable financial provision has been made, and/or what it should be, the relevant date is the date of hearing. Of course, on an appeal, if the question is whether the trial judge made an error of principle the facts and evidence must be taken as they stood before him. And if it should fall to the appellate court to remake the decision on the merits, as ordinarily it should not, any request to adduce further evidence will have to be judged by ordinary *Ladd v Marshall* principles (see [1954] 1 WLR 1489).

The course of proceedings in the present case

26. District Judge Million found that the deceased's will did not make reasonable provision for Mrs Ilott. He awarded her £50,000. Mrs Ilott was dissatisfied with the amount and appealed. Her claim has varied over time, but both before the District Judge and on appeal from him she sought capital provision amounting to half or more of the estate. The charitable beneficiaries, who had not appealed thus far, then cross appealed challenging the conclusion that there had been any failure of reasonable financial provision. The appeal and cross appeal came on before Eleanor King J (as she then was) with a tight timetable. She was invited to deal first with the cross appeal. She concluded that the District Judge had erred in law/principle in asking himself whether the deceased had acted reasonably rather than whether there had been a failure to make reasonable provision, and that he should have held that there was no lack of reasonable provision. The cross appeal having thus been allowed, Mrs Ilott's appeal on quantum did not arise.

27. Mrs Ilott appealed to the Court of Appeal against King J's decision. She succeeded, because that court held that the District Judge had not made the error claimed. He had perhaps at one stage been at risk of appearing to found his decision upon his judgment about the reasonableness of the deceased's decision to make no provision for her daughter, going in some little detail into the rights and wrongs of the failed attempts at reconciliation. But he had then gone on properly to confront the section 3 factors and to pose the correct question as set out in *In re Coventry*, which he cited, namely whether, objectively viewed, reasonable financial provision for the claimant had been made. The court remitted back to the High Court Mrs Ilott's appeal as to the amount of the order. That appeal then came before Parker J, who upheld the District Judge's order.

28. Mrs Ilott then appealed that decision also. The Court of Appeal, thus visiting the case for a second time, held that the District Judge had fallen into two errors of principle in arriving at his award of £50,000. It proceeded to make its own evaluation of the claim. It awarded Mrs Ilott (1) £143,000 to buy the house she lived in and (2) an option to receive a further £20,000 in one or more instalments. The present appeal to this court is from that last order. Whether or not there have been avoidable delays at various stages, in particular in mounting the first appeal to the Court of Appeal, the whole process has taken an unconscionable time. The deceased died in July 2004. The appeal before this court was argued in December 2016.

The decision of the Court of Appeal now under appeal

29. The Court of Appeal [2016] 1 All ER 932 held that the District Judge had fallen into two "fundamental" errors of principle. It was these which justified it in re-evaluating the claim for itself. Those two errors were said to be:

> i) he had held that the award should, in the light of the long estrangement and Mrs Ilott's independent life and lack of expectation of benefit, be limited, but he had not identified what the award would have been without these factors and thus the reduction attributable to them; and
>
> ii) he had made his award of £50,000 without knowing what the effect of it would be upon the benefits which Mrs Ilott and her family presently received.

30. Having on these grounds set aside the order of the District Judge, the Court of Appeal arrived at its own assessment of the proper award by the following route.

> i) It held that in order to balance the claims on the estate fairly it was necessary to treat a claimant who is in receipt of state benefits in the same way as a claimant who is elderly or disabled, as having for that reason increased needs for living expenses. The benefits, it held, "must be preserved".
>
> ii) Accordingly it made an award of a capital sum sufficient to enable the claimant to buy the house in which she lived. That was an award expressly made on the basis that it would not affect benefits entitlement. The court added that it would, if the claimant chose, enable her to augment her income later by way of equity release.

iii) It then added a further award of £20,000. This was expressed as an option with provision for drawing in instalments at the election of the claimant. Although that sum was said to be such as to provide a small additional income, it too was expressly awarded in order to enable the claimant to draw it down bit by bit in such a way as to avoid any impact on benefit entitlement.

31. These principal conclusions were expressed by the court in the leading judgment of Arden LJ as follows:

> "60. 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.
>
> 61. 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.
>
> 62. 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.
>
> 63. 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 [executors] within two months of the date of this order (or within such longer period as the appellant and [they] 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 [sic] 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.
>
> 64. The option may be exercised in part more than once provided that the total sum of £20,000 is not thereby exceeded. I have expressed the provision of a capital sum as an option so that, if the award of a capital sum would result in the loss of benefits, she can if she wishes take a lesser sum, or (as she may prefer to do if she is advised that her benefits will not be prejudiced) she may take the lesser sum and spend it, and then exercise the option for an amount or amounts not exceeding the balance."

The first suggested error

32. The Court of Appeal held that the first error was revealed by para 67 of the judgment of the District Judge. He had said this:

> "67. In my judgment all of the above factors has produced an unreasonable result in that no provision at all was made for Mrs Ilott in her mother's will in circumstances where Mrs Ilott is in some financial need. However, I also accept that Mrs Ilott has not had any expectancy of any provision for herself. Mr and Mrs Ilott have managed their life over many years without any expectancy that Mrs Ilott would receive anything. That does not mean that the result is a reasonable one in the straightened financial circumstances of the family. But it does mean, in my judgment that any provision now must be limited."

33. As to that, the Court of Appeal said, at para 35:

> "… 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. 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."

34. The Act requires a single assessment by the judge of what reasonable financial provision should be made in all the circumstances of the case. It does not require the judge to fix some hypothetical standard of reasonable provision and then either add to it, or discount from it, by percentage points or otherwise, for variable factors. To the contrary, the section 3 factors, which are themselves all variables and which are likely often to be in tension one with another, are all to be considered so far as they are relevant, and in the light of them a single assessment of reasonable financial provision is to be made. There is no warrant in the Act for requiring a process of the kind suggested by the Court of Appeal. If the judge were to arrive at a figure for reasonable financial provision without one or more of the relevant facts in the case, he would not be undertaking the assessment required by the Act. Which of the facts is he to ignore for the purpose of arriving at a hypothetical or "headline" figure, before adjusting it?

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. In many cases this will be of considerable importance. If, by contrast with the present case, the claimant were a child of the deceased who had remained exceptionally and confidentially close to her mother throughout, had supported and nurtured her in her old age at some cost in time and money to herself, and if she had been promised many times that she would be looked after in the will, 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. But without going through any such exercise, and yet adhering to the concept of maintenance, a judge ought in such circumstances to attach importance to the closeness of the relationship in arriving at his assessment of what reasonable financial provision requires. In the paragraphs leading up to the

one criticised by the Court of Appeal, this Judge had dutifully worked his way through each of the section 3 factors. The long estrangement was the reason the testator made the will she did. It meant that Mrs Ilott was not only a non-dependent adult child but had made her life entirely separately from her mother, and lacked any expectation of benefit from her estate. Because of these consequences, the estrangement was one of the two dominant factors in this case; the other was Mrs Ilott's very straitened financial position. Some judges might legitimately have concluded that the very long and deep estrangement had meant that the deceased had no remaining obligation to make any provision for her independent adult daughter - as indeed did Eleanor King J when it appeared that she had scope to re-make the decision. As it was, the judge was perfectly entitled to reach the conclusion which he did, namely that there was a failure of reasonable financial provision, but that what reasonable provision would be was coloured by the nature of the relationship between mother and daughter.

The second suggested error

36. The Court of Appeal described this as follows:

> "36. 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."

That proposition was allied to the conclusion which appears at the end of para 60 of the judgment, cited above, namely that there would be little or no benefit for Mrs Ilott in the District Judge's award because of the effect it would have on state benefits. What the court meant was that capital beyond £16,000 would disentitle Mrs Ilott from two of the benefits her family received, namely housing benefit and council tax benefit (see para 9 above). Since those two benefits paid a little over £5,000 per year to the family, the court was no doubt right to say that the reduction in benefits would equal or probably exceed the annual sum produced if the District Judge's capital award were invested on *Duxbury* lines.

37. It is relevant to note the case made for Mrs Ilott which the District Judge was addressing. He recorded it as follows.

"70. ... At the end of his final submissions, under pressure from me to quantify his claim, Mr Smith descended to some figures. On behalf of Mrs Ilott he sought:

> (1) £186,000 to permit her to purchase their own home (with a discount under the right to buy provisions);
>
> (2) £53,000 to pay for a single storey extension to the house, to give more living room for the family (including the four children who live at home);
>
> (3) A capitalised sum equivalent to an income of £10,000 per year for life. (He put no figure on this, but the Duxbury tables in At A Glance indicate a sum of £173,000 for a woman aged 46.);
>
> (4) Some further capital sum to permit the refurbishment and re-equipment of the house after its purchase. According to a list produced during the final hearing such a sum might amount to £40,950 (£27,450 plus £13,500).

71. The claimant also produced a proposed annual budget for the family which totalled £34,600. Allowing for Mr Ilott's income from his part time earnings at £5,304 (that is £4,164, plus £900 plus £240), and the current child benefit of £1,570, this would have required an additional annual income of £27,776. Capitalised for life for a female aged 46 years would require a sum of about £562,000 (using figures from At a Glance). This exceeds the size of the estate.

72. I regret to say that the claimant's case on these matters was presented in an ill thought out and unhelpful way.

73. I must keep in mind that under section 1(2)(b) of the Act the financial provision is for 'maintenance' - that is, income based. Mr Smith's justification for the capital sum sufficient to buy the family home was that it would free up income which would be spent otherwise on rent. But, because of the incidence of housing benefit, the net income released would be about

> £912 per year (£76 per month). This is the net amount of rent paid by the family after housing benefit.
>
> 74. Further, I was presented with no figures which showed the net effect (after benefits and tax credits) of providing an income of £10,000 per year. Also, when advancing the proposal for a capitalised sum I was presented with no figures to show the net effect which took into account the state benefits which the family receive. I assume that the practical consequence of a large capital payment would be that the family would lose most, if not all, of their benefits. None of these consequences appeared to have been thought through.
>
> 75. I have therefore been left to deal with this case with a more rough and ready approach."

38. Faced with this position, the District Judge rejected the distinctly ambitious claim made. Nobody now suggests he was not entitled to do that. 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. He might have added that that figure would be reduced by house maintenance costs which were presently met by the landlords. 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. He appears to have been (correctly) distinguishing between benefits and credits (and probably including child benefit in the latter). If so, he was right. If not, then he over - rather than under - estimated the effect of such an award, since working tax credits and child benefit (between them about £10,000 pa) would be unaffected. 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.

39. The real gravamen of the Court of Appeal's criticism is not so much that the District Judge did not "verify" the benefits rules, but that he produced an award which had little or no value to the claimant because of the impact on benefits. If that

were so, and certainly if it were done in ignorance of the true position, it might indeed be a legitimate error of principle justifying an appellate court in setting aside his order. But in fact it was not only not done in ignorance; it was not an award of little or no value to the claimant.

40. It was a central feature of Mrs Ilott's financial position that although the family could manage - just - on its income, this was at the cost of being unable to maintain the ordinary domestic equipment on which every household depends. She produced a telling list of the equipment which needed replacement, and of elementary refurbishment required, in order to enable the household to function adequately. The District Judge referred to it directly at para 70(4), set out above. Although some of the list itemised repairs to the structure, which would chiefly arise only if the house were to be purchased, and although no doubt some of the other items may not have been costed conservatively, one has only to read the document to see that Mrs Ilott made a strong case for the necessity of spending a substantial sum on items which could properly be described as necessities for daily living. They included such things as essential white goods, basic carpeting, floor covering and curtains, and the replacement of worn out and broken beds. That list did not include other similar necessities such as a reliable car, nor a holiday.

41. Although the District Judge arrived at his figure of £50,000 by reference to the income which it might produce, perhaps because he interpreted the statutory requirement for the award to be for maintenance as pointing to such an approach, 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. Moreover, how the claimant might use the award of £50,000 was of course up to her, but if a substantial part of it were spent in this way, the impact on the family's benefits would be minimised, because she could put the household onto a much sounder footing without for long retaining capital beyond the £16,000 ceiling at which entitlement to Housing and Council Tax Benefits is lost.

Conclusions

42. It follows that the District Judge did not, on fuller analysis, make either of the two errors on which the Court of Appeal relied to revisit his award. That is enough to require this court to set aside the order of the Court of Appeal.

43. The claimant pressed on this court the submission that the District Judge's award was vitiated by errors other than those attributed to him by the Court of

Appeal. It was said that he wrongly took the level of tax credits and child benefit (he attributed half to Mrs Ilott and thus about £4,000 pa) as a benchmark of basic maintenance income as recognised by the government. True it is that he referred to this as an indication of minimum income needs, and checked his figure of £50,000 against the capital sum which would produce an annual £4,000 on a *Duxbury* basis, namely about £69,000. But he did not make his award on this basis. He confronted the submission for the charities that Mrs Ilott's maintenance needs should be met by the sum of about £3,000-5,000 to pay for driving lessons and to see her back into work. He concluded that her reasonable needs were significantly greater than simply driving lessons and a small "starter" sum of capital. He accordingly provided a much greater capital sum, saying that there was a significant degree of approximation in it. Since he made clear that the award was limited to take account of the estrangement, and given the arguments put before him, his order is not to be taken as vitiated by erroneous reliance on the level of income produced by the working tax credits and child benefit. It was in fact an award which met many of Mrs Ilott's needs for maintenance. There was nothing about it which was outside the generous ambit of judgment available to him. His order ought to be restored.

44. There were in any event a number of potential difficulties about the Court of Appeal's proposed order. Plainly some judges might legitimately have concluded that this was a case in which reasonable financial provision for the claimant should be made by way of housing, even though the actual benefit of doing so would be much reduced by loss of housing benefit. In the absence of error of principle by the District Judge the occasion for the Court of Appeal to say what its own order might have been did not of course arise. But even if it had arisen, 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. It also seems likely that in the absence of a discretionary trust the additional "option" to draw down £20,000 at will would fall foul of exactly the same capital disqualification rules as to benefits, because those rules treat capital which is available to the claimant, but of which he has deprived himself, as being in his possession: see Housing Benefit Regulations 2006, SI 213/2006, regulations 49 & 50, (consolidated with the Council Tax Benefit Regulations SI 215/2006), together with the Guidance Manual issued to officers by the Department of Work and Pensions BW1 (13 September 2013), to which it does not seem the Court of Appeal was referred.

45. The treatment of benefits by the Court of Appeal at its para 60, cited above, might raise difficulty if taken literally. The court clearly cannot have meant that

dependence on benefits *increases* the claimant's needs, as disability is likely to do. In some circumstances, different from those of the present case, receipt of state support greater than the testator could sensibly provide may be an understandable reason why it was reasonable for the deceased not to make financial provision for the claimant - see for example the observations of Stamp J in *In re E, deceased* [1966] 1 WLR 709 at 715C. More generally, benefits are part of the resources of the claimant, and it is relevant to consider whether they will continue to be received. 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.

46. More critically, the order under appeal would give little if any weight to the quarter of a century of estrangement or to the testator's very clear wishes. The Court of Appeal indeed offered the view (at para 51) that these factors counted for little, and that Mrs Ilott's lack of expectation of any benefit from the estate was likewise of little weight, in part because the charities had no expectation of benefit either. Those observations should be treated with caution. The claim of the charities was not on a par with that of Mrs Ilott. True, it was not based on personal need, but charities 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. More fundamentally, these charities were the chosen beneficiaries of the deceased. They 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.

47. 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 (para 51(iv)). It is not the case that once there is a qualified claimant and a demonstrated need for maintenance, the testator's wishes cease to be of any weight. They may of course be overridden, but they are part of the circumstances of the case and fall to be assessed in the round together with all other relevant factors. Lastly, for the reasons adverted to above, it was not correct that so long and complete an estrangement was of little weight. The Court of Appeal suggested that this was so because (a) the claimant had not wished for the estrangement, (b) she had made a success of her life as a mother and home-maker and (c) it might well be that the estrangement was not really a matter of fault on either side, thus simply, in effect, a sad fact of family life. It was certainly true that the claimant had made a success of her home life, but that does not bear at all on the relationship between mother and daughter. As to the other two considerations, the District Judge had indeed held that both sides were responsible for the continuation of the estrangement, whilst attaching the greater responsibility

to the deceased. These matters of conduct were not irrelevant, but care must be taken to avoid making awards under the 1975 Act primarily rewards for good behaviour on the part of the claimant or penalties for bad on the part of the deceased. It is clear that the District Judge gave effect to his findings as to the causes of the estrangement in allowing the claim, as he was entitled to do, but it does not follow that the relationship between mother and daughter was of insignificant weight to the exercise, and he rightly held that it was not.

Disposal

48. For all these reasons, the appeal of the charities should be allowed. The order of the Court of Appeal should be set aside and the order of the District Judge restored. This court was told that this appeal was brought by the charities largely on principle because of the possible impact of the decision below on other cases, and that some arrangement has been arrived at between these parties in the event that the appeal succeeded. Given the very protracted nature of these proceedings, that is clearly likely to have been sensible, but the court has rightly not been concerned with its details, and it has no relevance to the order now made.

LADY HALE: (with whom Lord Kerr and Lord Wilson agree)

49. This case raises some profound questions about the nature of family obligations, the relationship between family obligations and the state, and the relationship between the freedom of property owners to dispose of their property as they see fit and their duty to fulfil their family obligations. All are raised by the facts of this case but none is answered by the legislation which we have to apply or by the work of the Law Commission which led to it.

50. In his book on *The Inheritance (Family Provision) Act 1938* (Sweet & Maxwell, 1950), Michael Albery commented:

> "The protection of the rights of the family as an essential unit in society is a primary concern of most systems of law. Complete freedom of testation, as enjoyed under English law for a brief period of 47 years, is therefore by the standards of contemporary jurisprudence an anomaly."

In many modern legal systems, mostly those descended from Roman Law, complete freedom of testation is unknown. Members of the family enjoy fixed rights of inheritance to the estate of a deceased, which leave only limited scope for the deceased to make his own dispositions. In some systems, consanguinity is preferred

to affinity. The claims of descendants of the deceased are favoured over the claims of a surviving spouse. The theory is that the property belongs to the family or lineage rather than to the owner for the time being and should pass down the blood line. Other systems favour affinity over consanguinity. Early English law also recognised certain fixed rights of inheritance, but these were only between husbands and wives, and the limited rights given to widows and widowers disappeared long ago.

51. In 1971, the Law Commission published a wide-ranging consultation paper on *Family Property Law* (Working Paper No 42), discussing, among other things, both community of property between husbands and wives and fixed rights of inheritance for spouses and children. In the course of discussing the latter, the Commission suggested (para 4.13) that:

> "The principle of absolute freedom of testation is acceptable only if the view were taken that it is more important to be able to dispose of property than to meet natural and legal obligations to the family. We do not believe this view to have any degree of support."

Nevertheless, although they raised the possibility that a surviving spouse might have fixed inheritance rights, they rejected the idea that a surviving child might do so. In their view, the moral obligation to provide for children was as great as that to provide for a spouse. But children play less part in building up the family assets than do spouses; are more likely to be self-supporting adults independent of their parents; and it would be difficult for a fixed rights system to distinguish between dependent and independent adult children. The better solution, therefore, was discretionary family provision rather than fixed rights (para 4.16).

52. When the Commission came to make their Report in relation to the various matters canvassed in their Working Paper, they concluded that it was "neither necessary nor desirable" to introduce a system of fixed inheritance rights for the surviving spouse: see *First Report on Family Property: A New Approach* (1973, Law Com No 52). This was on the basis that their proposals for improving the system of discretionary family provision would be implemented. Those proposals were contained in their *Second Report on Family Property: Family Provision on Death* (1974, Law Com No 61) and implemented in the Inheritance (Provision for Family and Dependants) Act 1975, with which (as amended) we are concerned in this case. Freedom of testation is thus the default position in the law of England and Wales, subject to the courts' limited discretionary powers.

53. Freedom of testation seems also to enjoy strong support from public opinion, although the need to interfere in certain circumstances is also recognised. When the

Law Commission returned to the subjects of intestacy and family provision in 2008, family forms were a great deal more varied than they had been in the early 1970s. Many more couples lived together without marrying. Many more children were born to unmarried parents. Many more married or unmarried partners separated and formed new relationships, often blending children from earlier relationships with children from the new. The Commission recommended a variety of improvements in the present law, but none which is directly relevant to the dilemma posed by this case (see *Intestacy and Family Claims on Death*, Consultation Paper No 191, 2009, and Law Com No 331, 2011). However, the Commission did have the benefit of two empirical studies of attitudes towards inheritance, both of them under the auspices of the highly respected National Centre for Social Research, the findings of which are of some interest.

54. G Morrell, M Barnard and R Legard, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families* (NatCen, 2009) used focus groups of people from such "non-traditional" families to explore attitudes on the basis of a series of vignettes. This revealed strong emotional support for testamentary freedom, linked to ideas of individualism and human rights. But underlying this was an "assumption of reasonableness", that testators had good reasons for doing what they did, and that it would not necessarily be possible to ascertain what their reasons were, so it should be assumed that they were reasonable. Nevertheless, there were circumstances in which it should be possible to challenge a will. One was where there was good reason to think that the will did not reflect the true wishes of the testator. The other was where his decisions were clearly "unreasonable": this might be because they were unfair, cutting someone out of a will who had contributed directly or indirectly to the deceased's wealth or who had earned a share by caring for the deceased while he was alive. It might also be unfair to cut children out of wills because of the contribution they had made to enriching the lives of their parents or to exclude a potential beneficiary who was disabled or vulnerable and the alternative was that the state would have to look after him. When it came to the intestacy rules, however, different opinions were expressed about the claims of adult descendants: some who viewed the importance of the "bloodline" as paramount took the view that adult children should always be able to benefit from the deceased's estate. Others took a more flexible view, depending on the relative claims and needs of surviving partners and adult children.

55. The other study was by A Humphrey, L Mills and G Morrell of the National Centre and G Douglas and H Woodward of Cardiff University, *Inheritance and the family: attitudes to will-making and intestacy* (NatCen, 2010). This used a combination of quantitative and qualitative approaches. The quantitative study asked for respondents' views on will-making and what should happen on intestacy in a variety of scenarios. One was a married man survived by his wife and two children over 18. 80% thought that the whole estate should go to the widow or that she should have priority over the children, 16% thought it should be shared equally,

and the remainder that the children should have priority or get it all. There was stronger support for the grown-up children when a woman died survived by a man with whom she had lived for 25 years and their two children over 18. A quarter thought that the estate should be shared equally and almost a quarter thought that the children should have priority or have it all. There was even stronger support if a man died survived by a wife and grown up children from his first marriage. 35% thought that the estate should be shared equally and 19% that the children of the first marriage should have priority or get it all.

56. The qualitative study explored the reasons for respondents' views, including their views on testamentary freedom, and found three approaches: complete testamentary freedom in all circumstances; challenging a will being permitted in some circumstances; and challenging a will being permitted in all circumstances. Some favoured the entitlement of children to challenge based on lineage and expectations. These respondents tended to favour equal distribution amongst descendants. Others favoured an entitlement based on need or providing care for the deceased. The "overriding influence" on those who favoured a right to challenge in all circumstances was the importance of retaining property within the family. When it came to the intestacy rules, there were some who felt that the age of descendants should have no effect on their entitlement; some who felt that adult descendants were less entitled than child descendants; and some who felt that age should not affect entitlement as such but should affect how and when the descendant actually inherited their share of the estate.

57. It will therefore be seen that, unsurprisingly, there is a variety of reasons why people believe that descendants should be entitled to a share of the deceased's estate. The bloodline or lineage is undoubtedly one of these, and seems to have featured strongly in both studies. Another is need, whether stemming from disability or poverty, although others felt strongly that descendants should be treated equally irrespective of need. And a third is desert, having earned a share by caring for the deceased or contributing directly or indirectly to the acquisition of his wealth.

58. The point of mentioning all this is to demonstrate 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. That range of opinion may very well be shared by members of the judiciary who have to decide these claims. The problem with the present law is that it gives us virtually no help in deciding how to evaluate these or balance them with other claims on the estate. Nor does the Law Commission Report which led to the 1975 Act. That Report recommended that any child or child of the family of the deceased should be able to apply, irrespective of age, sex or marital status, thus removing the restrictions imposed by the 1938 Act (para 79). The argument against doing that was that "it might encourage able-bodied sons capable of supporting themselves to apply for provision from the estate, thereby possibly incurring costs to be paid from the estate

and reducing the share of the surviving spouse or other beneficiaries"; but the Commission argued that such sons (or even daughters!) could not succeed unless the deceased had failed to make reasonable provision for them (para 74).

59. The Commission considered limiting adult claims to children who were actually dependent on the deceased when he died, but rejected that because:

> "this would rule out a claim against the estate of a parent who had unreasonably refused to support an adult child during his life time where it would have been morally appropriate to provide such support. Moreover an adult child, who is fully self-supporting at the time of the parent's death, may quite suddenly thereafter cease to be so."

Hence their final recommendation was to remove all age limits "leaving the court to distinguish between the deserving and the undeserving" (para 76). But the Commission gave no further guidance as to who should be thought deserving and who should not.

60. The only guidance the court is given is: (1) the threshold question is whether the estate makes reasonable financial provision for the applicant; (2) if it does not, 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 (3) that in deciding both of those questions, the court has to have regard to the matters listed in section 3 (see para 11 above). These look at the actual and foreseeable financial resources and needs of the applicant, any other applicant and any beneficiary; the obligations and responsibilities of the deceased towards any applicant or beneficiary; the size and nature of the estate; any physical or mental disability of any applicant or beneficiary; and any other matter, including the conduct of the applicant or any other person, which the court may consider relevant. In the case of children, the court must also consider the manner in which the claimant has been, is being or might be expected to be educated or trained. Section 1(7) of the 1938 Act, requiring the court to have regard to any reasons given by the deceased for making or not making the dispositions in his will, has been repealed: the reasonableness or otherwise of the testator's dispositions was to be tested objectively; the Commission agreed with Michael Albery that if the testator's reasons were "good and founded on fact" they would be relevant under "other matters", so there was no need to mention them separately (para 3.23).

61. As Black LJ wisely observed when this case first came before the Court of Appeal: [2011] EWCA Civ 346; [2011] 2 FCR 1, para 88:

> "A dispassionate study of each of the matters set out in section 3(1) will not provide the answer to the question whether the will makes reasonable financial provision for the applicant, no matter how thorough and careful it is. … [S]ection 3 provides no guidance about the relative importance to be attached to each of the relevant criteria. So between the dispassionate study and the answer to the first question lies the value judgment to which the authorities have referred. It seems to me that the jurisprudence reveals a struggle to articulate, for the benefit of the parties in the particular case and of practitioners, how that value judgment has been, or should be, made on a given set of facts."

62. How then is the court to "distinguish between the deserving and the undeserving"? It might be thought, for example, that in the case of a large estate consisting mostly of inherited property, the children ought to inherit even if they are not in need. But that would run counter to the restriction of their claims to reasonable maintenance. It would also run counter to the approach long taken in the law of *inter vivos* financial provision for adult children. Thus in *Lord Lilford v Glynn* [1979] 1 WLR 78, the judge had ordered a father, in addition to making periodical payments and providing for his daughters' education, to make an immediate settlement upon them of £25,000 (a not inconsiderable sum in those days). The Court of Appeal held that "a father - even the richest father - ought not to be regarded as under 'financial obligations [or] responsibilities' to provide funds for the purpose of such settlements as are envisaged in this case on children who are under no disability and whose maintenance and education is secure" (p 85). That, of course, was a value judgment which may or may not have been based on a view that such provision ought to be "earned". But it could be justified under the Matrimonial Causes Act 1973, because it contains age limits on the provision which may be ordered for children unless they are disabled, with the obvious aim of seeing them into adulthood and beyond that only to the end of their education. The 1975 Act contains no such age or disability related limits. So once again we are driven to ask what makes an adult child deserving or undeserving of reasonable maintenance?

63. One factor which is not in the list, but which does feature elsewhere in family law, is the public interest in family members discharging their responsibilities towards one another so that these do not fall upon the state. In the well-known case of *Hyman v Hyman* [1929] AC 601, the House of Lords held that the court's statutory powers to order a divorced husband to maintain his former wife were granted "partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support" (per Lord Atkin, at p 629; see also Lord Hailsham LC, at p 608). However, while the common law recognised a husband's duty to maintain his wife and his infant children (reluctant though it was to provide effective means of enforcing this), it did not recognise a duty to maintain adult children. Public law, similarly, has not

(at most periods) imposed the intra-familial maintenance duties which are known, for example, in French law. So what, if anything, is the relevance of the fact that an applicant's household is very largely dependent on state benefits (in this case some 75% of their income) to the threshold question, let alone to the quantification of any order to be made?

64. For these reasons, I have every sympathy for the difficult position in which District Judge Million found himself. He was faced with the complete disinheritance of an adult child in favour of charities in which the deceased had shown little or no interest while alive. The adult child was in straitened circumstances, living in rented accommodation which was almost entirely financed by the public purse, through housing and council tax benefit. These benefits were means-tested by reference to income and to capital and would be lost if there were capital of more than £16,000. The family lived within its modest means, but these too were largely derived from the public purse, the husband's meagre earnings being supplemented by tax credit, child tax credit and child benefit. Apart from child benefit, these were means-tested, but by reference only to income and not capital. The household goods were old and dilapidated - the family could do with another car, some furniture and carpets and white goods, and had never had a holiday, so it might be regarded as reasonable to spend money on these and thus quite quickly reduce a capital sum to below £16,000 without incurring penalties. On the other hand, mother and daughter had been estranged since the daughter left home to live with and then marry her husband, of whom the mother disapproved, three attempts at reconciliation having failed. The mother had left a letter explaining why she had disinherited her daughter, which the district judge did not find wholly "founded on truth".

65. So what was he to do? A respectable case could be made for at least three very different solutions:

> (1) He might have declined to make any order at all. The applicant was self-sufficient, albeit largely dependent on public funds, and had been so for many years. She had no expectation of inheriting anything from her mother. She had not looked after her mother. She had not contributed to the acquisition of her mother's wealth. Rather than giving her mother pleasure, she had been a sad disappointment to her. The law has not, or not yet, recognised a public interest in expecting or obliging parents to support their adult children so as to save the public money. Thus it is not surprising that Eleanor King J regarded this as the reasonable result: [2009] EWHC 3114 (Fam); [2010] 1 FLR 1613. The Court of Appeal allowed the appeal on the basis that the District Judge had not erred in law and the exercise of his discretion had not been plainly wrong, so Eleanor King J should not have interfered. But Sir Nicholas Wall P commented that (as Wilson LJ had observed when giving permission to appeal) had the District Judge dismissed

the claim "I doubt very much whether the appellant would have secured reversal of that dismissal on appeal" (para 59).

(2) He might have decided to make an order which would have the dual benefits of giving the applicant what she most needed and saving the public purse the most money. That is in effect what the Court of Appeal did, by ordering the estate to pay enough money to enable her to buy the rented home which the housing association was willing to sell to her and a further lump sum to draw down as she saw fit. Housing is undoubtedly one of the first things that anyone needs for her maintenance, along with food and fuel. This was benefits-efficient from her point of view, because it preserved the family's claims to means-tested income benefits. It was benefits-efficient from the public's point of view, because it saved the substantial sums payable in housing benefit. She would lose the benefit of the landlord's repairing obligations, but how valuable this would be is a matter of speculation. It is difficult to reconcile the grant of an absolute interest in real property with the concept of reasonable provision for maintenance: buying the house and settling it upon her for life with reversion to the estate would be more compatible with that. But the court envisaged her being able to use the capital to provide herself with an income to meet her living costs in future.

(3) He might have done what in fact he did for the reasons he did. He reasoned that an income of £4,000 per year would provide her with her "share" of the household's tax credit entitlement and capitalised this in a rough and ready way, taking into account some future limited earning potential, at £50,000. He did not expressly consider, and was not presented with the information to enable him to consider, the effect that this would have on the family's benefit entitlements, and in particular the fact that they would lose their entitlement to housing benefit until their capital was reduced below £16,000.

66. Some might think that the best choice was between options (1) and (2). Option (1) was not, however, open to the Court of Appeal this time round and is not open to this Court now. The case for option (2) is that, if it is reasonable for the applicant to receive some support, it is reasonable for that support to be meaningful to her and her family, as well as to the public purse. Securing her accommodation is more meaningful than proving her with a capital sum which will be of little use unless she is able properly to reduce it within a relatively short time. This is not to down-play the public interest in charitable giving and the importance of legacies in the funding of charitable activities. But just as the applicant had no expectation of a legacy, neither did the charities. However, the greater the weight attached to testamentary freedom, the smaller the provision which might be thought reasonable in an unusual case such as this. It is, as Black LJ observed, a value judgment. The District Judge did not make his order on the express basis that it would enable the

applicant to buy much needed household goods and have a family holiday, but that will be its beneficial effect. Hence I agree with Lord Hughes that it was entirely open to him to make the order that he did, and just as it should not have been disturbed first time round it should not have been disturbed this time either. I have written this judgment only to demonstrate what, in my view, is the unsatisfactory state of the present law, giving as it does no guidance as to the factors to be taken into account in deciding whether an adult child is deserving or undeserving of reasonable maintenance. I regret that the Law Commission did not reconsider the fundamental principles underlying such claims when last they dealt with this topic in 2011.