

Financial provision

How do you balance the competing s.3 factors in claims for financial provision by:

- (1) adult children
- (2) cohabitees and
- (3) dependants?

Alex Troup KC



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"Alex is simply extraordinary. He has a tremendous ability to understand the facts and quickly grasps the details of complex issues and the legal nuances behind the evidence. He is an advocate who is quick on his feet in court."

LEGAL 500, 2024

Adult children

Re Annan [2023] EWHC 662 (Ch)

- Decision of Zacaroli J (now LJ)
- 2 claimants, one of whom is disabled
- Useful for
 - General approach to claims by adult children
 - Treatment of debts
 - Use of discretionary trust



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Siblings at war

- Father dies leaving 3 children: Wayne, Russell and Heather
- Modest estate worth under £500k
- Will leaves £10k to each child, residue to Heather
- Reason:
 - Wayne killed partner of Russell's daughter
 - Russell has a gambling habit



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Helpful summary of Ilott

- Maintenance cannot extend to any or everything which it would be desirable for C to have
- Maintenance connotes only payment which, directly or indirectly, enables C to discharge cost of his daily living at standard appropriate to him
- Maintenance is flexible and falls to be assessed on facts of each case
- Need for maintenance is a necessary but not a sufficient condition for an order
- Accordingly, need plus qualifying relationship is not always enough
- A moral claim is not a *sine qua non* for all applications
- Test is objective, although reasonableness of Decd's conduct can be relevant under s.3(1)(g)
- Facts fall to be assessed at the date of the hearing



Judge's approach

- (1) Consider s.3 factors
- (2) Consider whether Wayne and/or Russell meet the “necessary but not sufficient” condition that they have a maintenance need
- (3) If so, is there something else beyond mere fact of blood relationship
- (4) If so, what award should be made

Result: Wayne's claim fails; Russell awarded £25k settled on discretionary trust



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Debts

- Wayne had 2 debts: £40k statutory charge and £20k bounceback loan
- **In Re Dennis [1981] 2 All ER 140**: Maintenance may include payment of debts *“for example, to pay the debts of an applicant in order to enable him to carry on a profit-making business or profession may well be for his maintenance.”*
- **Baynes v. Hedger [2009] EWCA Civ 374** at §45: The payment of a past debt does not fall within the broad concept of maintenance unless the payment of that debt enables the claimant to derive a future income, or the debt represents living expenses since the death
- Held: payment of Wayne’s debts would not fall within maintenance





Discretionary trust

- Commonly used tool for avoiding 1975 Act award prejudicing state benefits
- E.g. Hanbury v. Hanbury [1999] 2 FLR 255 and Challinor v. Challinor [2009] EWHC 180 (Ch)
- But futile to convert existing legacy into a trust: F v. R [2023] COPLR 10
- Here (1) court prepared to accept that trust would preserve Russell's benefits, and (2) trust justified by gambling habit in any event
- Recent use by Master Brightwell in Re Bala [2023] EWHC 1054 (Ch)



Cohabitees

- Issue: will housing need be met by giving C a property outright or merely a life interest?
- **Ilott**: *“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”*
- Approving **Myers v. Myers [2005] WTLR 851**: life interest coupled with (two) powers of advancement to cater for future care costs



2 x Life interest cases post-Ilott

- **Martin v. Williams [2017] EWHC 491 (Ch)**
 - Decision of Marcus Smith J on appeal from HHJ Gerald
 - Argument that animosity would render trust unworkable rejected
- **Banfield v. Campbell [2018] EWHC 1943 (Ch)**
 - There will be cases in which provision by way of a lump sum for housing is appropriate and can be justified as maintenance in the form of relieving C from a liability to pay rent
 - Relevant factors: (1) Decd had child by earlier relationship whom she expected to support, (2) suitable property would cost more than 50% of estate



3 x Outright interest cases post-Ilott

- **Thompson v. Raggett [2018] EWHC 688 (Ch)**
 - Long period of cohabitation, antagonism
 - C.f. Banfield factors: no children, property worth less than 50%
- **Jassal v. Shah [2021] EWHC 3552 (on appeal: [2024] EWHC 2214 (Ch))**
 - C's property needs assessed at £235k; no discussion of life interest
- **B v. C [2021] WTLR 1**
 - B's young age, B's child is likely beneficiary under discretionary will trust



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Dependants

Limited recent caselaw, perhaps because residual category (“*not being a person included in the foregoing paragraphs of this subsection*”)

Delaforte v. Flood [2021] WTLR 499

- Decision of HHJ Johns KC
- Useful for:
 - General approach
 - What falls within maintenance
 - Contingencies



The caring granddaughter

- C was granddaughter who moved into Decd's property and acted as her full-time carer for 8 years
- Decd died leaving £430k estate
- Decd's will in favour of her 2 children (including C's mother)
- D1 abandoned argument of commercial arrangement for purposes of s.1(1)(e)



Judge's approach

- Ds conceded that will failed to make reasonable financial provision, and that award should be of capital sum; only issue was quantum
- Given size of estate, Ds' lack of financial needs, and no relevant conduct, focus was on C's financial needs
- C awarded £110k consisting of:
 - £91k income shortfall for 3 years
 - £9k for car
 - £10k for contingencies



Items qualifying as maintenance

- Socialising
- Holidays
- Presents
- Pension contribution – *“Some modest pension provision is not in the realm of everything which it would be desirable for the claimant to have... It is particularly appropriate where, through caring for [Decd], she has missed out on several very significant years of pension contributions already.”*



Contingencies

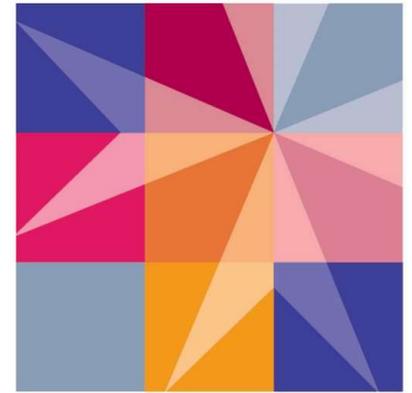
- Legitimate to take into account contingencies when formulating claim for capital sum
- Contingency in Delaforte v Flood was cost of furnishing
- C.f. future care costs in Re Annan (above)
- See also Higgins v. Morgan [2022] WTLR 153 where £10k awarded for (unspecified) contingencies

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