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Serle Court

Testamentary Freedom

How are judges weighing this as a factor in 1975 Act claims since Ilott v The Blue Cross?

serle court

HHJ Paul Matthews, *Legg v Burton*, [2017] EWHC 2088 (Ch), Aug 2017

- the reality in England in 2017 is that testators are in practice far less free than is popularly supposed to make their wills as they see fit. Contrary to popular mythology, complete freedom of testation in England only existed between 1891, or (if we ignore limits on gifts to charity) 1833 (for men) or 1883 (for women), and 1938. And even between those times the high tide of Victorian family morality (which lasted well into the twentieth century) ensured that testators in practice did "the right thing". Today there are not just family and societal pressures on what you may do with your estate, but also legal ones, in the form of the Inheritance (Provision for Family and Dependants) Act 1975, which all sensible testators take into account in making their wills. The number of cases where emancipated adult children make a successful claim under that Act demonstrates a sea-change in judicial attitudes even since 1937 (when apparently all the chancery judges save one were against the proposed new legislation in principle ..).

Ilott: emphasis on testamentary freedom

- Opening words in para 1 of judgment of all 7 JJSC:

'*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.*'

- But….tension with family provision legislation:

'*[legislation] 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.*'

Ilott: emphasis on testamentary freedom

- Para 13:
  - *The 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.*'

- [Suggesting that the weight to be attached to testamentary freedom is embedded in the structure of the legislation?]

Ilott: key passages at paras 46-47

- But then….para 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 . . it cannot be ignored that an award under the Act is at the expense of those whom the testator intended to benefit*'

- And the Supreme Court's statement as to how to consider T's wishes is to be found in para 47….

Ilott: key passages at paras 46-47

- '*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) [of the CA judgment, July 2015]). 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*.'

- So, presumably under section 3(1)(g)?

Ilott: NB. additional judgment of Lady Hale

- Noted variety of reasons why members of public believe descendants should be entitled to share of estate:
  1. Bloodline/lineage
  2. Need, esp stemming from disability or poverty
  3. Desert, where C has ‘earned’ a share of estate by caring for T or by contributing directly/indirectly to acquisition of wealth
- Further noted that this wide range of public opinion may well be shared by Judges (and that three very different decisions could respectably have been reached in *Ilott*)

Ilott: NB. additional judgment of Lady Hale

- Para 66:

‘*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 .. a value judgment***.’

- [This seems to tie in with suggestion that testamentary freedom/wishes and weight to be attached to it/them is to be weighed up under s.3(1)(g) as part of overall exercise of reaching a value judgment in 1975 Act claims]

Testamentary wishes

- How will these principles be applied in practice?
  - Additional hurdle for claimant in every 1975 Act case?
    - If so, are claims against intestate estates more likely to succeed?
  - Will the weight to be attached to testamentary wishes depend on:
    - Reasonableness of the wishes? (see para 17)
    - How contemporaneously they were expressed?
    - Testator's knowledge at time of making the will?
    - Whether testator had indicated any intention to change his will?
    - Consistency of wishes/duration of time for which testator held same wish?

Post-*Ilott* cases

(1) *Nahajec v Fowle*, HHJ Saffman, 18 July 2017

- adult children's claim, following long estrangment
- no mention of testamentary freedom despite extensive citation of *Ilott*
- at the most, could possibly be said that judge may have considered testamentary freedom as part of his consideration of the reasonableness of T's wishes, but this would only be by implication

Post-*Ilott* cases

(2) *Ball v Ball*, HHJ Paul Matthews, 2 August 2017

- adult children's claim
- testamentary freedom barely mentioned, and only as a principle which is subject to the 1975 Act

Post-*Ilott* cases

(3) *Lewis v Warner*, Court of Appeal, 19 Dec 2017

- Second appeal
- 91-year-old claimant 'needed' to be able to remain in the deceased's house where he had co-habited for 20 years
- CA did not disagree with trial judge's assessment that he had been 'maintained' in this way, and that this maintenance should continue
- Claimant was well-off, and able to re-house himself
- Order: for property to be transferred to him for full consideration (based on expert report as to market value)

Post-*Ilott* cases

(3) *Lewis v Warner*, Court of Appeal, 19 Dec 2017

- Sir Geoffrey Vos, C:
  - cited and applied *Ilott* passages on testamentary freedom
  - '*I take full account of the strictures of the Supreme Court as to the freedom of testamentary disposition*' (without any further explanation as to how they were applied)
  - Considered context of possible conscious decision by T not to make provision for Mr Warner to remain in her property after her death, speculating that such a decision may have been made when she was not fully apprised of what his age and infirmity would be at the moment of her own death
  - Mr Warner's objectively assessed needs appear to have been more important than any other factor

Post-*Ilott* cases

(4) *Thompson v Elverson*, HHJ Jarman QC, 29 March 2018

- unmarried cohabitee's claim
- testamentary freedom not mentioned, despite *Ilott* having been cited
- examination of T's reasons/motive for making will, and their accuracy

Post-*Ilott* cases

(5) *Banfield v Campbell*, Master Teverson, 24 July 2018

- unmarried cohabitee/dependant's claim
- defendant was T's son whom she loved dearly
- para 47 of *Ilott* re testamentary wishes mentioned in context of evaluation of s.3(1)(d) obligations of deceased and T's affectionate expression of wish to leave all to her son

Post-*Ilott* cases

(6) *Ubbi v Ubbi*, Master Shuman, 27 July 2018

- infant children's claim
- will executed before birth of children, so no conscious choice of T to exclude children
  - [this seems to have significantly 'watered down' the importance of testamentary freedom: para 60]
- T died unexpectedly aged only 53

Post-*Ilott* cases

(7) *Wellesley v Earl Cowley*, Deputy Master Linwood, 11 January 2019

- adult child's claim following long estrangement
- para 47 of *Ilott* re testamentary wishes mentioned in context of evaluation of s.3(1)(g)
  - detailed examination of reasons for estrangement and reasons why T gave only £20,000 legacy to C

Post-*Ilott* cases

(8) *Cowan v Foreman*, Mostyn J, Family Division, 25 February 2019

- s.4 application by widow for permission to issue 17 months out of time
- C was principal beneficiary of two testamentary trusts: discretionary beneficiary of one, and revocable life interest in the other, with letter of wishes favouring C
- C contended that she lacked security

Post-*Ilott* cases

(8) *Cowan v Foreman* (continued)

- Mostyn J, para 21:

'*I have to say that I completely disagree. [C's] argument was tantamount to saying that every widow has an entitlement to outright testamentary provision from her husband. This would, in effect, introduce a form of forced spousal heirship unknown to the law. Plainly, this cannot be right. It must be possible for a testator to provide for his widow by a generous trust arrangement such as this, without the fear that it will be interfered with at huge expense in proceedings under the 1975 Act*'

Post-*Ilott* cases

(8) *Cowan v Foreman* (continued)

- Mostyn J, para 22

'*I have to make the qualitative proleptic assessment as to whether the trustees will honour Michael's wishes and ensure that every reasonable need of the claimant is met until her death. There is absolutely nothing in the evidence to suggest that they would blatantly defy his wishes. Were they to do so it would not only be completely immoral but would likely amount to a breach of trust which would be actionable at the suit of the claimant.*'

Cowan v Foreman: Court of Appeal

Expedited decision on 30 July 2019 [Asplin LJ, Baker LJ, King LJ]

- Successful appeal from Mostyn J's decision
- Judge had fallen into trap of considering whether Deceased's intentions were reasonable, rather than whether reasonable financial provision had not been made for claimant (including no autonomy and no security)
- Judge wrong to have assumed that letter of wishes would be 100% complied with by trustees
- Judge wrong to have concluded that C would have claim against trustees if they failed to follow letter of wishes

Post-*Ilott* cases

(9) ***Clarke v Allen***, Deputy Master Linwood, 23 May 2019

- Widow's claim
- '*In terms of conduct under s.3(1)(g) I must consider the weight I should attach to testamentary freedom*'

Returning to the questions…..

- How will these principles be applied in practice?
  - Probably under s.3(1)(g) as part of evaluation of relevant conduct and other circumstances, including motive/reasons behind testamentary dispositions

Additional hurdle for claimant in every 1975 Act case? No

Are claims against intestate estates more likely to succeed? Not necessarily

Returning to the questions…..

- Will the weight to be attached to testamentary wishes depend on:
  - Reasonableness of the wishes? Yes
  - How contemporaneously they were expressed? Yes
  - Testator's knowledge at time of making the will? Yes, including the accuracy of the facts 'known' by testator
  - Whether testator had indicated any intention to change his will? Yes, depending perhaps on firmness of intention, extent to which changes were planned, reasons for planned change
  - Consistency of wishes/duration of time for which testator held same wish? Probably

A footnote:
Duxbury vs Ogden

Clarke v Allen, Deputy Master Linwood, Chancery Division, 23 May 2019

- Widow's claim
- Claimant suffered stroke during litigation, which meant that she lost capacity and had 'extremely high' need for 24-hour care
- Ogden tables used to calculate lump sum award because
  - Claimant needed lifelong nursing care, the cost of which was anticipated to increase ahead of general inflation [Ogden tables reflect a high higher than general rate of inflation applicable to medical and care costs components]
  - Claimant was over 74 [Duxbury tables of limited use where life expectancy <15 years]
  - Longer-term investment would be unlikely to provide the financial security or certainty necessary

Thank you