The Elderly Lady and The Cats' Home:
The Blue Cross and others –v- Heather Ilot ([2017] UKSC 17)

by Hamish Dunlop

1. On 15th March 2017, the Supreme Court[1] gave judgment in the appeal of **The Blue Cross and others –v- Heather Ilot ([2017] UKSC 17)**. The case concerns Mrs Ilot's application brought under the Inheritance (Provision for Family and Dependants) Act 1975 ('the Act').

2. Although the Act is now over 40 years old, it has never received substantive review by the most senior Court in the country. This appeal has therefore been eagerly awaited by practitioners in the expectation of guidance in particular in relation to: managing the frequent tension between a Claimant's needs and the testator's wishes; and the definitions of *reasonable financial provision* and *maintenance* under the Act.

3. The case concerns the class of Claimant whose dependency arises in a context of being *other than a spouse or civil partner.* It obviously remains to be seen whether the Court will now find an opportunity to review the law in cases involving a *spouse* as Claimant. In the meantime, this case provides specific assistance in relation to *'non-spouse'* cases and some general jurisprudence in relation to all claims under the Act.

The Relevant Statutory Framework

4. The framework of the Act is familiar. In order to apply for relief, a Claimant must prove that he/she falls within the prescribed class of applicants, being: a current or former spouse or civil partner of the deceased; their child or child of the family; a person being maintained immediately before death by the deceased; or a person living in the same household as the deceased as if their spouse for 2 years before the death[2]. It imposes a two-stage task on the court when addressing a Claimant's application for financial provision from the estate of the deceased:
   - 4.1. The first question is *whether the testator's will makes reasonable financial provision for the Applicant (per* ***section 1 (1) (c) of the Act)***[3] ('the first limb of the test');
   - 4.2. The second question, which arises only if the first is answered in the negative, *is whether and to what extent the court should exercise its own wide powers in that respect (****per section 2(1)****)*[4] ('the second limb of the test').

[1] Lord Neuberger, Lady Hale, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, and Lord Hughes. Oral argument heard on 12th December 2016

[2] Section 1 of the Act.

[3] Section 1 (1) of the Act provides as follows: *'Where … a person dies domiciled in England and Wales and is survived by any of the following persons … 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.*

5. In relation to applications by all Claimants except a surviving spouse of the deceased, the expression "reasonable financial provision" means simply:
'… such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.' (per ***Section 1(2)(b) of the Act).***

The corresponding criterion for spouses is judged by the 'fictitious divorce' test[5].

6. **Section 2** defines the armoury of Orders available to the Court, including:
(a). An order for periodical payments;

(b). An order for the payment of a lump sum;

(c). A property transfer order;

(d). An order settling estate property on the Applicant;

(e). An order for the acquisition and transfer of estate property to the applicant or for the settlement thereof.

7. **Section 3(1) of the Act** sets out the matters to which the court is to have regard in determining whether the disposition effected by the will is such as to make reasonable financial provision for the Claimant and, if the court considers that it is not, in determining whether and in what manner it will exercise its powers under s 2 of the Act. The familiar list is as follows:
"(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."

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[4] Section 2(1) of the Act provides that: *'... 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'*

[5] Per **section 1(2)(a) of the Act**: 'Such financial provision as it would be reasonable in all the circumstances of the same for a husband or wife to receive whether or not that provision is required for his or her maintenance'. Additional considerations under the section 2 criteria include (§2(2)): (the age of the applicant; the duration of the marriage; the applicant's contributions to the marriage; the provision that the applicant might reasonably have expected to receive if the marriage had been terminated by divorce rather than death.

8. Finally, **section 3(5)** of the Act provides that: '*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'.*

The Facts

9. Heather Ilot was the only child of Mr and Mrs Jackson, who were married on 3 March 1956. Mr Jackson was killed in an accident at work about three months before Mrs Ilot was born. His employer made a substantial payment to Mrs Jackson which she used to pay off the mortgage on the family home. She was brought up by her mother.
10. In November 1978, aged 17, the Appellant left home without her mother's knowledge or agreement to live with Nicholas Ilott, whom she later married on 30 April 1983. Thereafter, she has lived with her husband at 16 Edward Cottages, Ware, Hertfordshire ('the property'). Mr Ilot and the Appellant had 5 children. At the time of the trial, two were under 18. By 2016, only 1 lived at the property but she was shortly going to University. The property was rented from a housing association but Mr & Mrs Ilott had the right to buy it at a discounted price, held at £143,000 until the end of July 2015.
11. DJ Million found that the Ilots had a net annual income of £20,387 comprising: Mr Ilot's earnings from acting of £4,100: child benefit (£1,878); working tax credits (£8,112)[6]; and entitlement to housing and council tax Benefit (£5,100)[7]. They had savings of £4,000. As a result of their straitened circumstances: they had never had a holiday, had difficulty affording clothes for the children; were limited in the food they could buy and that much of what they had was old or second-hand[8].
12. The Appellant and Mrs Jackson were estranged. There were three attempts at reconciliation, all of which failed. At the original hearing, DJ Million held that Mrs Jackson had acted in an unreasonable, capricious and harsh way towards the Appellant but that both sides were responsible for the failure of these attempts.
13. When Mrs Jackson died, she left a will made in April 2002. The will: provided a legacy of £5,000 to the BBC Benevolent Fund; with the balance being divided equally between the Blue Cross, the RSPB and the RSPCA. It was common ground that Mrs Jackson had no connection with the charities during her lifetime. The value of the estate at the date of the trial was £486,000.

The History of the Litigation

14. Mrs Ilot's claim for financial provision from the estate was heard by DJ Million on 7th August 2007 (the original hearing). At that stage: Mrs Ilot sought sufficient funds to acquire a house and provide a capital sum for her maintenance; it was said that at times her case exceeded the estate available; the charities offered £3-4,000, essentially, for driving lessons.

15. Addressing the two-stage task imposed by the statute, DJ Million[9]:

    15.1. As to the first limb of the test, found that the will failed to make adequate financial provision for Mrs Ilot; and

[6] Not influenced by savings levels.
[7] Paragraph 23 of DJ Million's judgment; paragraph 7 of the SC judgment. These payments are means tested: and are not payable if a Claimant has savings in excess of £16,000.
[8] Paragraph 45 to 46 of Parker J's judgment in the 2nd High Court hearing.
[9] DJ Million's judgment is published as an annex to Arden LJ's judgment in the 2nd Court of Appeal hearing (**[2015] EWCA Civ 797**) at paragraphs 67 to 81.

15.2. As to the second limb of the test: assessed the financial provision that it would be reasonable for her to receive as £50,000.

16. The charities appealed. At the (first) High Court appeal hearing, King J allowed the appeal and set aside DJ Million's award on the first limb of the test. In King J's view, no relief was payable under the Act.

17. On appeal to the Court of Appeal (for the first time) (**[2011] 2 FCR**[10]), the Court:

17.1. Allowed the appeal against King J's order and restored DJ Million's approach to the first limb (finding that the will failed to make reasonable financial provision for Mrs Ilot); but

17.2. Remitted to the High Court the appeal against DJ Million's order on the 2nd limb (quantification of her claim);

18. On remittal for a 2nd High Court appeal hearing, Parker J dismissed Mrs Ilot's appeal against quantification and upheld the £50,000 ordered by DJ Million.

19. Mrs Ilot appealed again to the Court of Appeal on the issue of quantification. The appeal was heard in July 2015 (**[2015] EWCA Civ 797)**[11]**.** In the leading judgment of the Court, Arden LJ allowed Mrs Ilot's appeal and awarded her: a lump sum of £143,000 so as to allow her to buy her house; and an option to draw down a further £20,000[12] from the estate to provide an immediate capital sum from which further income needs could be met;

20. The charities appealed to the Supreme Court.

The Supreme Court Decision

21. The Supreme Court allowed the charities' appeal and re-instated DJ Million's order; providing to Mrs Ilot £50,000.

22. The main speech was given by Lord Hughes; with whom the whole Court agreed. A subsidiary speech was given by Baroness Hale; with whom Lords Kerr and Wilson agreed.

23. Lord Hughes began his speech by recording the context of the Act, namely: the primacy of a testator's wishes to leave their estate upon death to whomsoever they choose:

> *'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'.*

[10] Sir Nicholas Wall (P), Arden and Black LJJ.
[11] Arden and Ryder LJJ and Sir Colin Rimer. Argument heard on 3rd July and Judgment on 27th July.
[12] If invested, this would generate £331 net income pa for the rest of Mr Ilot's life.

24. In his view, there were 4 *key features* of the Act, namely:

24.1. The statute stipulated no automatic provisions. Rather, the terms of the deceased's applied unless a specific application under the Act is made;

24.2. Only a limited class of applicant is entitled to bring an application;

24.3. The test for all applicants apart from spouses (and civil partners) is defined by *what is needed for their maintenance*; and

24.4. The test of what is *reasonable financial provision* to meet that maintenance is an objective one.

Maintenance

25. Having recited the statutory framework, Lord Hughes addressed in some detail the concept of *reasonable financial provision*[13]. His essential observations were these.

26. The concept of maintenance was broad; but the distinction made by section 1(2) between the classes of 'spouse' and 'non-spouse' demonstrated that it could not extend to *any or everything which it would be desirable for the claimant to have*. Rather the term imported a provision to meet the *everyday expenses of living*. In that context, he cited with approval the summary of Browne-Wilkinson J *In re Dennis, deceased* [1981] 2 All ER 140 at 145-146:

> *"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."*

27. The level at which maintenance may be provided for is clearly flexible and fact-specific. It is not limited to subsistence level. Nor need it necessarily be provided for by way of periodical payments. It will very often be more appropriate, as well as cheaper and more convenient if income is provided by way of a lump sum from which both income and capital can be drawn over the years. Alternatively, a lump sum might properly fund such *one off payments* as: a car or the provision of housing. However: in the event that funds are made available for housing, it would often be appropriate to have the property returned to the estate upon the

[13] Paragraph 12 of the judgment.

death of the Claimant[14]. In any event, it is necessary to remember that the statutory power is to provide for maintenance and not to confer capital on the Claimant.

Reasonable Financial Provision

28. The trigger for making an order under the Act is to prove that the will fails to make *reasonable financial provision* for the Claimant; the trigger is not activated *per se* by proving that the testator acted unreasonably. Although the reasonableness of the deceased's decision is capable of being a factor within the statutory considerations under **sections 3(1)(d) and (g) of the Act,** it would be dangerous to confuse the two issues. In that context, Lord Hughes adopted the following test adopted by Oliver J **In re: Coventry ([1980] Ch 461):**

> *"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."*

29. All cases which are limited to maintenance will turn largely upon the asserted needs of the claimant. However, for some *non-spouse* claimants, need alone may not be a sufficient condition for an order. Lord Hughes cited 2 such examples as: an adult child who was capable of earning an independent living; and a case involving a long period of estrangement. In such cases, something more is required. Often, that requirement will be satisfied by proving a moral claim to maintenance. In that context, Lord Hughes further cited Oliver J in **In re Coventry** when he said:

> *"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."*

[14] Paragraph 44 of the judgment.

30. Furthermore, meeting the claimant's needs is not necessarily the measure of the order which ought to be made. The competing claims of others may inhibit the practicability of wholly meeting the needs of the claimant, however reasonable. Furthermore, 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 be to meet only part of the needs of the claimant. This might be appropriate because of the distance of the relationship, or perhaps because of the conduct of one or other of the parties.

Judicial Approach to the Statutory Test

31. Lord Hughes provided assistance to the Court in how to approach the 2 stage test referred to in paragraph 4 (above). Although there may be some cases in which it was appropriate to separate the 2 questions, in many circumstances the same conclusions would both answer the question whether reasonable financial provision has been made for the claimant and identify what that financial provision should be. He cited a number of examples[15]. He concluded that: the Act required a broad brush approach; the court was entitled in many cases simply to set out the facts then address both questions under the Act without repeating them. Furthermore, **Section 3(5) of the Act** required that the Court had to address the questions based on the evidence and valuations at the date of the hearing.

The Outcome of the Appeal

32. In allowing the charities' appeal, the Supreme Court concluded that the Court of Appeal had been wrong to criticise DJ Million's judgment and order. In particular:

32.1. DJ Million had been right to treat as a relevant factor in the exercise of his discretion the nature of the relationship between mother and daughter and in particular: Mrs Ilot's long-established independency from her mother; and her lack of expectation of benefit;

32.2. He had correctly identified the influence of the award on Mrs Ilot's receipt of certain benefits. In applications under the Act, benefits are part of the resources of the Claimant and it is relevant to consider whether they will continue to be received. In some cases, the Claimant's continuing receipt of state benefits 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.

33. Lord Hughes concluded by referring to the testator's *very clear wishes* of which he said this (at paragraph 47):

> *"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".*

[15] Such as: 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 (see §24).

The Speech of Baroness Hale

34. Baroness Hale recorded that the present law gives virtually no help in deciding *how* to evaluate the conflicting criteria under section 3 of the Act or as she put it: '*to distinguish between the deserving and the undeserving'.* She felt that this was particularly relevant to cases involving adult children. In expressing *every sympathy* for DJ Million, she concluded that a *respectable case* could be made for at least 3 very different solutions on the facts:

34.1. No order at all;

34.2. An order equivalent to that formulated by the Court of Appeal: allowing Mrs Ilot to buy her house and retain an option to draw down a further £20,000 from which further income needs could be met; or

34.3. The order that DJ Million in fact made.

35. In conclusion, the Supreme Court has helped practitioners and the judiciary alike in: better understanding the definition of *maintenance* and *reasonable financial provision* for the purposes of the Act; and in approaching the relevance of a moral claim. However, Baroness Hale's candid recognition of the breadth of acceptable outcomes in Mrs Ilot's claim demonstrates the persisting unpredictability of claims under the Act.

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Barrister at Law: Call 1991

"He has excellent rapport with clients and is truly knowledgeable in the complex field of financial remedy."

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"He has a fantastic rapport with clients and really knows his stuff"

Legal 500 UK Bar Directory 2015

"Hamish Dunlop- *'Precise and thorough'."*

Legal 500 UK Bar Directory 2014

"Hamish Dunlop's *'court demeanour is controlled and eloquent'."*

Legal 500 UK Bar Directory 2013

Hamish's family law practice is concerned with the financial claims of: spouses on divorce; co-habitees upon separation and dependants from the estate of a deceased. In the context of financial provision on divorce, he has particular expertise in: cases involving family businesses; professional clients and the military.

He advises and represents co-habitees, co owners and other family members on property issues including legal and beneficial ownerships and promisory and proprietary estoppel. He also provides advice and representation in ancillary relief matters, appearing in both County and High Court. He advises on Inheritance Act cases.

Recent notable cases

Owens v Owens ((On-going) Court of Appeal) Acting for a Husband who has successfully contested his Wife's petition of divorce. Appeal heard by full Court on 14th February 2017; judgment awaited.

B v B ((2016) High Court (Mostyn J)) Financial Provision on Divorce. The Husband operated a successful general trading business from a site in Oxfordshire. They thereby acquired a portfolio of UK investment properties. Value of assets = c.£14M. The Husband disposed of a number of the properties into offshore trusts which the Wife attacked. The Oxfordshire business site was under development for residential housing and there were complicated tax issues

A v V ((2015) CFC) Applications for: a declaration of paternity and relief under Schedule 1 of the Children Act 1989. Representing a UK resident mother in her applications against a

Dubai- based businessman father. Father was extremely wealthy and chose not to disclose his assets, running a 'millionaires defence'. The case involved issues of: jurisdiction and the extent to which a previous agreement reached by the parties should be binding on them.

MB v The Executors of EB (Deceased) ((2016) Bristol CC). Representing a widow on her application for financial provision from her deceased husband's estate. Her husband's estate left nothing to the widow save an entitlement to remain at her family home for life.

D-C and ors v The Personal Representatives of N-C (2013). Inheritance Act claim. The claim was bought by a number of dependants against the estate of the deceased who was a property developer on the South Coast. The estate included a number of properties and the shares in the deceased's company.

S v D (2013). Financial claims between a Cohabiting Couple. Competing claims to various interests in the parties' family home; farming business and associated farmland.

C v R (2013). Financial claims over Dynastic Wealth within a Family. Competing TOLATA claims concerning 2 existing properties but involving tracing financial interests through a 3 further houses.

Hamish was until 2012 the Chair of the Hampshire Family Justice Money and Property Committee. He is regularly invited to lecture at external conferences and offers bespoke in-house training seminars for clients.

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