

The road to freedom

April 2017

A review of landmark decision of *Illot (Respondent) v The Blue Cross and others (Appellants)* [2017] UKSC 17

As many people are aware, on 2 April 2012 Guernsey saw a significant overhaul of its inheritance laws with the introduction of the Inheritance (Guernsey) Law, 2011.

This law abolished Guernsey's previous rules of forced heirship which stipulated that, in certain circumstances, an individual did not have complete freedom to leave their estate to whomever they wished upon their death. Instead, these customary rules were replaced with the concept of testamentary freedom.

From 2 April 2012 all individuals domiciled in Guernsey at the date of their death, or owning real estate situate within the island, have been able to decide exactly who should inherit any assets which they leave behind. This also includes the manner in which those assets are inherited, taking our current rules of inheritance largely into line with those which have been in place in the UK since the introduction of the Inheritance (Provision for Family and Dependents) Act 1975.

Although these regulations were not introduced Bailiwick wide, on 1 January 2016, Alderney followed suit with the introduction of the Inheritance (Alderney) Law, 2015 leaving Sark and the Bailiwick of Jersey somewhat lagging behind.

Whilst these laws have introduced freedom to all individuals to leave their estates as they wish, they have been somewhat caveated with the concept of "financial provision" coming in hand in hand. This concept means that certain classes of individuals, such as spouses, children or dependants, may be able to make a claim against a deceased's estate if they feel they have not been provided with a "reasonable financial provision". Where an individual, other than a spouse or civil partner, makes such a claim then, taking into account all the circumstances of the case, a reasonable financial provision must be one which is deemed to be so in terms of "maintenance". The fact that there is no definition of "maintenance" under the new laws shows the wide discretion that the Court has when considering these types of claims.

To date, we have not yet seen any claims for financial provision tested through the Guernsey Courts. However, on 15 March 2017, the UK saw the handing down of the long anticipated decision of the Supreme Court in the case of, "*Illot (Respondent) v The Blue Cross and others (Appellants)* [2017] UKSC 17", known largely to most due to its heavy press coverage as, "*Illot v Mitson*".

This case marked the first time that the highest UK Court has been asked to consider the terms of the UK 1975 Act. In brief, the deceased died in 2004 having prepared a Will in 2002, under which she left her entire net estate (worth approximately £500,000) to three charities with which she had had little connection during her lifetime; the RSPB, the RSPCA and the Blue Cross. The deceased had been estranged from her daughter (Illot) for 26 years and made it clear that she did not wish Illot to inherit from her estate. Following her mother's death, Illot, who was in receipt of state benefits, made a claim for financial provision from her late mother's estate.

At first instance the County Court awarded Illot a sum of £50,000 however she appealed this sum and, in 2014, was latterly awarded an increased sum of £163,000 by the Court of Appeal. The charities then appealed this decision and the Supreme Court, on the basis that the supposed errors made by the District Judge in arriving at the decision in the first instance and upon which the Court of Appeal had

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relied to increase the initial award had not been made, allowed the appeal, setting aside the order of the Court of Appeal and reinstating the order of the District Judge, reducing Ilott's provision back down to a sum of £50,000.

This case has raised many issues during its journey. Was the fundamental concept of UK law that an individual is able to leave their estate to whom they wish under threat? Are individuals really free to leave their assets exactly as they like? How easy will it be for adult children to challenge a Will?

This final decision of the Supreme Court raised profound questions about an individual's ability to freely dispose of their estate but has enabled some key issues surrounding financial provision claims to be addressed, namely:

- The reasonableness of the deceased's wishes will, of course, remain a factor in the outcome of any claim. The assessment of reasonableness must however be considered separately to the question of whether reasonable financial provision has been made for a claimant. Lord Hughes indicated that, *"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."*
- *"Maintenance"* should largely be considered as the provision of an income, as opposed to capital. Lord Hughes commented that maintenance, *"cannot extend to any and every thing which is desirable for the claimant to have"*. Therefore in future any capital awards which may be made in these cases are likely to be limited only to circumstances where the award of an income would cause difficulties.
- Where an adult child attempts to make a claim against a parent's estate there should be, *"an additional something"*, present for the outcome of a claim to be successful. In many cases, a moral claim.
- Where charitable beneficiaries are freely chosen by a deceased then it is not the case that anything they may receive from an estate is simply a *"windfall"*. Charities rely heavily on testamentary bequests that, themselves, may be considered of public benefit and they should not be required to justify a competing claim of their own to an estate against other beneficiaries.
- Finally, and arguable most importantly, a testator's wishes when making their Will will be taken into account when considering any claim and should be respected. The Supreme Court indicated that they felt the Court of Appeal had not given significant weight to this factor and that a court considering a claim should not simply weigh-up the resources of the claimant and of the beneficiaries but, importantly, consider whether reasonable provision has been made for the claimant with the testator's wishes firmly in mind.

Overall it has been considered that the decision of the Supreme Court was a "win" for testamentary freedom. It supports a testator's ability to choose their beneficiaries and should give comfort that their wishes would be taken into consideration by the Court, even if their estate is faced with a future claim.

What impact the introduction of the Guernsey and Alderney inheritance laws, and the potential for financial provision claims will have, remains to be seen – we have certainly seen a number of individuals who wish, for good and solid reasons, to disinherit family members come forward. However what is clear is that, following the decision of the UK Court (not binding in Guernsey but persuasive), it is even more important to ensure that you have considered your wishes and put a Will in place.

For more information please contact:

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