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Family provision claims and young children: *Re R (Deceased)*

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INTRODUCTION

In England and Wales, the Inheritance (Provision for Family and Dependants) Act 1975 allows specific individuals to claim against a deceased person's estate, if dissatisfied with an intestacy or will's distribution.[1] Potential claimants[2] are listed in section 1(1) of the Act, with applications by, or on behalf of, 'a child of the deceased' contemplated by section 1(1)(c).[3] The wording means that any child may apply, regardless of their age.[4] As the legislation approaches its half-century, it is true to say that the bulk of claims under section 1(1)(c) have involved adult children, many of whom were in financial need;[5] those involving infants and minors have, to use the old phrase, been 'few and far between'. This is hardly surprising. Parents have a duty to provide for their children financially, with legal obligations in the form

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1 For an overview, see G Douglas, 'Family provision and family practices – the discretionary regime of the Inheritance Act of England and Wales' (2014) 4(2) Oñati Socio-Legal Series. Identical legislation is in force in Northern Ireland, under the Inheritance (Provision for Family and Dependants) (NI) Order 1979; the core provisions will also be referenced below.

2 While 'claimant' is the more usual term today, the word 'applicant' appears in the legislation and both will be used interchangeably here.

3 1979 Order, art 3(1)(c).

4 The reference to 'child' includes an adopted child of the deceased, persons who would have been classed as an illegitimate child in the past, unborn children (a child *en ventre sa mère*) and children born by assisted reproduction techniques who are the legal child of the deceased.

5 And regardless of whether they were financially dependent on their (now deceased) parent. While the Supreme Court ruling in *Ilott v The Blue Cross* [2017] UKSC 17; [2017] 2 WLR 979 concluded one of the best-known examples of a family provision claim involving an adult child who was in necessitous circumstances, there are numerous other examples. For a flavour of the decisions prior to this ruling, see H Conway, 'Do parents always know best? Posthumous provision and adult children' in W Barr (ed), *Modern Studies in Property Law*, vol 8 (Hart Publishing 2015) 117–134. For post-*Ilott* illustrations, see *Noble v Morrison* [2019] NICh 8, *Miles v Shearer* [2021] EWHC 1000 (Ch) and *Rochford v Rochford* [2021] 2 WLUK 699.

of maintenance payments by a non-resident parent on divorce or the dissolution of a registered civil partnership,[6] and the Child Maintenance Service as the public body that deals with child maintenance (replacing the Child Support Agency (CSA) in February 2013).

When making a will, most parents include their infant and minor children since the latter are viewed as natural recipients of parental wealth and have ongoing financial needs that must be met.[7] Disinheritance[8] typically results from outdated or lax estate planning where, for instance, an old will pre-dates parenthood;[9] situations in which a parent *deliberately* leaves their estate to other family members (or elsewhere) to the complete exclusion of young children will be rare. However, the decision in the recent English case of *Re R (Deceased)*[10] is a salutary reminder that testators who are inclined to act in this manner would be strongly advised to reconsider.

FAMILY PROVISION CLAIMS: A BRIEF REMINDER

The basis of all claims under the 1975 Act is a failure to make 'reasonable financial provision'[11] for the individual in question. For surviving spouses and civil partners, the test is what 'would be reasonable in all the circumstances of the case';[12] for all other categories, claims are based on what it would be reasonable for the applicant to receive for his/her 'maintenance'.[13] What constitutes maintenance is not defined

6 See eg the Matrimonial Causes Act 1973, ss 21 and 23 in England and Wales.

7 In a research project funded by the Joseph Rowntree Charitable Trust, children were most frequently cited (by 89 per cent of those surveyed who were expected to make a bequest) as intended beneficiaries under a will – K Rowlington and S McKay, *Attitudes to Inheritance in Britain* (Policy Press 2005). Research published by Legal and General in November 2021 shows that 60 per cent of participants left assets to their children, though the figure does not distinguish between young and adult children – Legal & General, 'Planning for the future'.

8 Though the word is something of a misnomer, since English law (like many other common law jurisdictions) imposes no legal obligation on parents to provide for their children on death.

9 A successful family provision claim is extremely likely where a parent's will was drafted before their child was born and consequently made no provision for them. For a recent illustration, see *Re Ubbi (Deceased)* [2018] EWHC 1396 (Ch) where the court awarded two children (born in 2012 and 2014) a lump sum payment of almost £400,000 from their late father's estate (valued at £4.5 million), where the father's last will had been drafted in 2010 and left everything to his wife. Divorce proceedings were pending between the deceased and his wife when he died in 2015; at this stage, the deceased had been living with the claimant children's mother for over a year.

10 [2021] EWHC 936 (Ch).

11 1975 Act, s 1(1); 1979 Order, art 3(1).

12 1975 Act, ss 1(2)(a)–(aa) and 1979 Order, art 2(2).

13 1975 Act, s 1(2)(b) and 1979 Order, art 2(2).

in the statute, though a number of judicial statements have clarified the matter. For example, Browne-Wilkinson J (as he then was) in *In Re Dennis (Deceased)*[14] described it as 'payments which … enable the applicant … to discharge the cost of his daily living at whatever standard of living is appropriate to him'. More recently, this somewhat restrictive interpretation was affirmed by the Supreme Court in the well-known case of *Ilott v The Blue Cross and Others*.[15] According to Lord Hughes, maintenance means just that: it 'cannot extend to any or every thing which it would be desirable for the claimant to have' and must 'import provision to meet the everyday expenses of living'.[16]

For all applications, courts should adopt the two-stage test set out by the Supreme Court in *Ilott*: '(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 …?'[17] In addressing each question, a range of statutory factors must be evaluated. General factors include the financial resources and future needs of the applicant and any beneficiaries of the estate, the size of the estate, and 'any obligations and responsibilities which the deceased had towards any applicant … or towards any beneficiary'.[18] Specific factors differ for each category of applicant;[19] for children, however, the only factor listed is the 'manner in which the applicant was being, or … might expect to be, educated or trained'.[20] If the court then decides that reasonable financial provision has not been made, it can choose from a range of orders listed in section 2 of the 1975 Act.[21]

The test is not whether the deceased acted reasonably, but whether reasonable financial provision has been made on the facts. And while the jurisdiction is a discretionary one, the decision in *Re R* suggests that success is almost guaranteed where the applicant is an infant or a minor who received nothing under their parent's will. Before turning

14 [1981] 2 All ER 140, 146. See also the dictum of Goff LJ in the Court of Appeal decision in *Re Coventry* [1980] Ch 461, 485.

15 [2017] UKSC 17; [2017] 2 WLR 979. The case was formerly listed as *Ilott v Mitson* and was the first family provision claim to reach the highest appellate court. For an analysis of the decision see B Sloan, '*Ilott v The Blue Cross* (2017): testing the limits of testamentary freedom' in B Sloan (ed), *Landmark Cases in Succession Law* (Hart Publishing 2019) 301 and H Conway, 'Testamentary freedom, family obligation and the *Ilott* legacy' [2017] The Conveyancer and Property Lawyer 372.

16 [2017] UKSC 17, [14].

17 Ibid [23] and affirmed more recently in Northern Ireland by McBride J in *Noble v Morrison* [2019] NICh 8.

18 1975 Act, s 3(1); 1979 Order, art 5(1).

19 1975 Act, ss 3(2)–(4); 1979 Order, arts 5(2)–(4).

20 1975 Act, s 3(3); 1979 Order, art 5(3).

21 1979 Order, art 4.

to that case, it is worth revisiting an older decision that dealt with the same issue, albeit in a slightly difficult factual context.

SETTING THE STANDARD: *IN RE PATTON*

Decided in the High Court of Northern Ireland, *In Re Patton*[22] is a rare example of a family provision claim involving a child claimant and one that is (regrettably) often overlooked in both judgments and succession law texts in England and Wales. The children in this case were twins – a boy and a girl – who were aged 11 at the time of their father's death in 1984. The deceased, who owned a small farm near Killylea in County Armagh, had been in an 'on-off' relationship with the children's mother since 1971. However, he had shown little interest in the children and rarely spoke of or saw them, though the mother had secured a court order for weekly maintenance payments a few months after the children were born. The deceased's actions in life were mirrored on death, when he bequeathed his entire estate – with a net value of around £52,000[23] – to other family members. Left with nothing but an annual pension from the Post Office Staff Superannuation Scheme to which the deceased had contributed for the support of the children until they attained 17 years, the children's mother brought a family provision claim on their behalf under the Inheritance (Provision for Family and Dependants) (NI) Order 1979.

In deciding that reasonable financial provision had not been made under the 1979 Order, Carswell J (as he then was) stated that 'a child's financial needs should rank very high in the order of priorities, and … should normally rank well before the needs of other beneficiaries'.[24] The children were awarded a lump sum of £10,000 each from the deceased's estate.

PLUS ÇA CHANGE: RE R (DECEASED)

Fast forward 35 years, and the decision in *Re R* suggests that, while much may have changed in the interim, the financial obligations that parents have towards their children – and the court's willingness to extend these 'beyond the grave'– have not.

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22 [1986] NI 45.

23 The original net value of around £47,000 was increased by £5,000 from a joint bank account which the deceased had held (the original £10,000 was due to pass to the other account holder by survivorship, until the court exercised its powers under art 11(1) of the 1979 Order – the equivalent of s 9 of the 1975 Act).

24 [1986] NI 45, 51.

Facts

The deceased was 41 years old when he died from an incurable lung disease in October 2018, leaving two sons, J and H, who were then aged 15 and 14 respectively. Relations between the three had been strained for some time. After the deceased and the claimants' mother (N) had divorced in 2012, the children had relocated to Scotland with N and her new husband in July 2013 (the deceased only found out about the move a few days before it happened). The children had weekly telephone calls with their father until these ceased sometime in 2014; the deceased stopped sending birthday and Christmas presents in 2016.[25] Following the divorce, the deceased had made child maintenance payments, until N stopped accepting them in early 2013 and contacted the CSA claiming that the deceased was under-estimating his income. However, N decided not to pursue the deceased for child maintenance (the CSA confirmed this in writing to the deceased), meaning that the deceased paid nothing towards his two sons from February 2013 onwards, and the children were looked after financially by their mother and step-father.

An earlier version of the deceased's will, made in 2013, left a portfolio of shares to his parents and the residue of the estate to J and H. When he made his final will in 2018, the deceased left his entire estate (valued somewhere between £519,081 and £720,481)[26] to his parents and to S, his new partner.[27] At the same time, the deceased set out his reasons for excluding his sons. Referring to the move to Scotland, the fact that he had not been able to contact J and H for over three years, and N's ongoing behaviour in not wanting him to be a part of the boys' lives, the deceased stated that he did not want his children 'to be a part of my family's life on my death'[28] and that he believed the boys did not require any financial payments from him given that no CSA or personal arrangements had been made with N for maintenance.

In December 2019, the children's mother commenced proceedings under the 1975 Act, acting on the boys' behalf as their mother and litigation friend.[29]

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25 For the purposes of the family provision claim, the court made no finding on who was to blame for contact ceasing.

26 There was conflicting evidence over the value of the deceased's shares, which were a significant part of the estate assets. The value of the net estate for the purposes of the 1975 Act was consequently lower than the net probate value of £813,836 which had been based on a single valuation of the shares.

27 The deceased also made no provision for C, his daughter from a previous relationship, on the basis that C was an adult and it had been agreed that he would no longer support her financially.

28 [2021] EWHC 936 (Ch), [33].

29 In J's case, this appointment as litigation friend ceased when he reached 18 although he continued to rely on his mother and the solicitors she had instructed to act for her.

Decision and reasoning

Master Teverson began by stressing that the 1975 Act 'cannot be used as a means to overturn or re-write a will'.[30] He then identified the statutory provisions applicable to the present claim and the core themes from *Ilott*, including the definition of maintenance and the fact that the legislation does not allow the court to make an order simply because it believes that the deceased acted unreasonably. Here, the applicants were young persons, one of whom was now at university and the other in sixth form at school; both were of school age at the time of their father's death. The issue for the court, therefore, was 'whether, and if so, how far the Deceased's estate should be required to provide for their maintenance until they [were] in a position to earn a reasonable wage or salary'.[31]

Master Teverson then worked systematically through the generic statutory factors, focusing on a number of key provisions:

Section 3(1)(a) – the financial resources and financial needs that the applicants have or are likely to have in the foreseeable future.

Both children had a very small amount of savings and were dependent for their needs on their mother and step-father. The amounts sought from the deceased's estate were £353,518 and £458,431 for J and H respectively.[32] Calculated by their mother (N), these sums were based on current and future living expenses; school-related expenses (including school fees); car-related expenses; university costs; counselling costs; and future housing costs.

Master Teverson noted that the basis for claiming these expenses seemed to be that 'the full amount of J and H's maintenance needs from the date of the Deceased's death should be met from the Deceased's estate',[33] since N had met those needs post-2012 without any contribution from the deceased. However, a more nuanced approach was needed; the idea that responsibility for maintenance should shift entirely to the deceased on death when child maintenance was not sought from him after the CSA assessment in 2013 did 'not seem right'.[34] Accepting the defendants' argument that the financial positions of N and the boys' step-father (A) were relevant factors when considering the resources available to J and H, the court reviewed the incomes and assets of both N and A. The court noted that A had net

30 [2021] EWHC 936 (Ch), [35].

31 Ibid [45].

32 These sums would have exceeded the valuation of the estate for the purposes of the 1975 Act claim; as noted earlier (see n 26 above), the net probate value had been in excess of £800,000.

33 [2021] EWHC 936 (Ch), [50].

34 Ibid [50].

assets of close to £3 million, although the fact that he had four children of his own had also been recorded earlier in the judgment.

Section 3(1)(c) – the financial resources and needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future

The deceased's partner, S, was in her forties and had no children. She had a property portfolio valued at over £2 million with a gross rental income exceeding £60,000 and over £200,000 in bank accounts and premium bonds. The home that S had jointly owned with the deceased had passed to her by survivorship; she had also received around £40,000 from the deceased's life policy.

The deceased's parents owned shares and had savings in the region of £83,000 (though these had been depleted by the current litigation). The couple owned their own home, two other rental properties and a plot of land; other income sources included their pensions.

Section 3(1)(d) – any obligations and responsibilities which the deceased had towards any applicant or towards any beneficiary of the estate of the deceased

The crux of the present claim was 'whether the Deceased at the date of his death continued to owe any obligations and responsibilities to J and H' and, if so, 'the nature and extent of those obligations and responsibilities'.[35] The defendants argued that these had ceased by the time the deceased made his final will in 2018: the deceased had not been maintaining J and H since 2012, had no contact with his children, and maintenance had been assumed by N and A. On behalf of J and H it was argued that the deceased continued to have obligations and responsibilities towards them as his children, both of whom were of school age when he died and whose education and training would be continuing for a number of years.

As for the beneficiaries of the estate, Master Teverson noted the deceased's relationship with S,[36] the fact that the couple's home had passed to her by survivorship, and that S had played a significant role in supporting the deceased as his health deteriorated. The deceased's parents had, over the years, contributed significantly to the wealth of the deceased.

35 Ibid [67].

36 Who was still married to her previous partner (and may still have been having sexual relations with him while with the deceased).

Section 3(1)(g) – Any other matter, including the conduct of the applicant or any other person, which the court considers relevant

Neither J nor H had been responsible for the fallout from their parent's divorce, and its 'sad outcome'[37] that the boys had ceased to have contact with their father (or grandparents).

Turning to the specific factor for child applicants listed in section 3(3) of the 1975 Act – the manner in which J and H were being or might expect to be educated or trained – Master Teverson noted that the children were at private school at the time of their parents' separation and that, 'subject to affordability, there was an expectation that J and H would be educated privately'.[38]

In addressing the first element of the two-stage test in *Ilott*, Master Teverson concluded that the deceased's will had failed to make reasonable financial provision for J and H. Noting a distinction between applications by a child of the deceased under section 1(1)(c), and those by a person who had been treated as a child of the deceased under section 1(1)(d) who must establish that maintenance has been provided, he continued:

> [I]t will not generally be open to beneficiaries in response to an application [under section 1(1)(c)] to rely on the fact that the deceased failed to provide child support (even if not called upon to do so), or to rely on the fact that the child was treated by a step-father as a child of his family and assumed responsibility for his maintenance. Lack of contact and the assumption of responsibility by another person are factors capable of impacting on the value of the claim. Only in the most exceptional circumstances would I expect the court to accept that the obligation to maintain had been completely severed. The concept of a clean-break is not generally applicable in respect of child maintenance.[39]

Turning to the second element (ie assessing the value of the award), the court stressed that the boys' mother could not expect the entire burden of maintaining them to shift to the deceased's estate after his death – even if N had been the only parent supporting J and H financially for several years. Sounding a cautionary note, Master Teverson stated:

> The court must … guard against unreasonable claims made on a child's behalf by the surviving parent especially in circumstances in which the claim is limited to what is reasonably required for the child's maintenance and where there is a proper ground for concern that the claim is being viewed as an attempt to re-write the 2018 Will.[40]

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37 [2021] EWHC 936 (Ch), [78].
38 Ibid [78].
39 Ibid [79].
40 Ibid [82].

The original total sum claimed on behalf of both boys was over £800,000, though this was revised downwards during the trial to remove both historic (pre-trial) costs and a claim of £30,000 for each claimant towards a future deposit on a house. This left J seeking £117,831.00 and H seeking £230,935.17. Working through the schedules submitted on behalf of the claimants, the court settled on the following figures:

1. Home living costs from January 2020[41] onwards, dividing these between N and the deceased's estate up to January 2025 for J and January 2026 for H to cover periods living at home until each boy had completed his university education. This gave sums of £15,000 and £18,000 respectively.
2. School fees from January 2020 onwards, with the estate paying 100 per cent of the fees of J's last year in school and paying 100 per cent of H's fees for fifth year and 80 per cent of his boarding fees for his last two years at school (the other 20 per cent to be paid by N and A). Master Teverson also emphasised the section 3(3) factor again here.
3. A contribution towards a second-hand car for each child constituted maintenance, for which the estate would pay £5,500 to J and to H.
4. University tuition fees were not a reasonable cost of maintenance (J was attending university in Scotland, and H could take out a student loan if he attended university in England). Sums of £16,000 and £7,500 were awarded to J and H respectively towards one-half of their accommodation costs at university.
5. Housing costs would be met by a payment of £5,000 to each claimant (50 per cent of £10,000 allowed for rent, furnishings etc) as a reasonable maintenance need to cover accommodation for a year after leaving university.
6. Both J and H had been emotionally affected by their parents' divorce. A sum of £2,990 would be awarded to each child, as 50 per cent of a year's private counselling fees.

The result was a final award of £68,022 to J and £117,962 to H from the deceased's estate, as reasonable financial provision for their maintenance under the 1975 Act. There was no obligation on the children to prove need; rather, these sums 'properly represent[ed] and reflect[ed] the extent of the limited continuing obligation on the part of the Deceased for the maintenance of J and H'.[42]

41 Taking January 2020 as the month immediately after the family provision claim had been issued.

42 [2021] EWHC 936 (Ch), [109].

Implications and observations

Re R is a useful contemporary addition to the sparse volume of case law on family provision claims involving infants and minors against a deceased parent's estate. The judgment highlights several interesting points, most notably the fact that the former – who have no current income or earning capacity – have ongoing financial needs, which will have to be met from the estate. Parents are still obliged to maintain their dependent children, regardless of changes in living arrangements, lack of contact, non-payment of child maintenance in the past, or the fact that the children were (and are) being financially supported by someone else.

What constitutes reasonable financial provision, and the value of any consequent award, is limited to maintenance; and while young children may attract larger sums based on their living costs, education-related fees and other specific needs, the judicial limits on maintenance combined with the ability to earn their own living within a certain timeframe act as checks and balances on any award. However, responsibility for maintenance does not automatically end at the age of majority. The category-specific factor – the manner in which an applicant was being or might expect to be educated or trained – extends to university education and (one would assume) to vocational training if a child chose that path instead. It is interesting that Master Teverson in *Re R* confined his analysis to the boys' undergraduate degrees,[43] and refused to include university tuition fees as part of the award. In contrast, school fees were a major factor in this case. Both J and H were being privately educated before their parents' marriage ended, and this was expected to continue as long as the financial resources were available; the fact that H was boarding in his final two years also increased the value of his award significantly, alongside the fact that he was the younger of the deceased's children and therefore needed to be maintained for slightly longer.

Assessing the award in any family provision claim will be fact-sensitive, though it is worth pointing out the final amounts in this case (£68,022 and £117,962 to J and H respectively) were significantly lower than the original sums sought for both claimants albeit still substantial for two teenage boys. The decision also makes it clear that the surviving parent cannot simply use a family provision claim to discharge their own future financial responsibilities towards their children, even if they have been providing the lion's (or lioness's) share of this in the past.

43 There was no mention of postgraduate study or provision being made for that.

CONCLUSION

In both *Re Patton* and *Re R*, the respective fathers made a conscious decision to leave nothing to their young children; in both cases, the respective courts altered the intended outcome.[44] While *Ilott* may have stressed the importance of testamentary freedom in family provision claims, it seems that courts are less inclined to indulge the freedoms of a testator who leaves nothing to an infant and minor child[45] – even if that particular testator believes that he or she has good reason not to, and makes the underlying reasons clear as in *Re R*.[46] In these circumstances, the estate will be extremely vulnerable to a successful claim under the 1975 Act (or 1979 Order in Northern Ireland). The amount awarded will be sizeable though not exorbitant; and the younger the child, the larger the sums that are likely to accrue over time as a reasonable maintenance need.

This contrasts sharply with adult children with earning capacity, and for whom no provision can be deemed reasonable financial provision under the legislation. As noted at the outset, parents have a legal obligation to look after their infants and minor children financially. It seems that this obligation is one that also transcends death and continues until such times as the child finishes either university or vocational education and can earn their own living.

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44 In both cases, it is also worth noting that the deceased left nothing to the respective mothers, which might have (indirectly) benefitted the children financially.

45 Master Teverson made a passing nod to the deceased's testamentary freedom, simply stating that it had been taken into account – [2021] EWHC 936 (Ch), [109].

46 Contrast this with other cases involving eg adult children where an explanatory document has been taken into account – see eg *Miles v Shearer* [2021] EWHC 1000 (Ch).