Neutral Citation Number: [2017] EWCA Civ 2182

Case No: A3/2016/3090

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE NEWEY
Case Nos: B00GL077 & B00GL0107

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL
Date: 19 December 2017

Before:
SIR GEOFFREY VOS, THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE McCOMBE
and
LADY JUSTICE ASPLIN

B E T W E E N

In claim number B00GL077

LYNN LEWIS
(as Executrix of the Estate of Audrey Blackwell, deceased)

Claimant / Appellant

and

THOMAS STANLEY WARNER

Defendant / Respondent

and

B E T W E E N

In claim number B00GL0107

THOMAS STANLEY WARNER

Claimant / Respondent

and

LYNN LEWIS
(as Executrix of the Estate of Audrey Blackwell, deceased)

Defendant / Appellant

- -

Mr Roger Evans (instructed by Moore Brown & Dixon LLP) appeared for Mr Warner

Mr Bernard Weatherill QC (instructed by Tierney & Co) appeared for Mrs Lewis

Hearing date: 7th December 2017

- -

Judgment Approved

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. This is the first time that an application by an unmarried partner under the amended subsections 1(1)(ba) and 1(1A) of the Inheritance (Provision for Family and Dependents) Act 1975 (the "1975 Act") has reached this court. This appeal also

raises the questions of whether the court has jurisdiction under the 1975 Act to order that the property of a deceased person's estate be transferred to a surviving partner for full value (or possibly more than full value), and whether such a transfer is properly to be regarded as "reasonable financial provision" for the partner's "maintenance" within the meaning of those terms in subsections 1(1) and 1(2)(b) and sections 2 and 3 of the 1975 Act.

2. Mr Thomas Stanley Warner, the applicant partner then aged 91 ("Mr Warner"), had lived for 19 years with Mrs Audrey Blackwell (the "deceased") at Green Avon, Twyning Green, Tewkesbury, Gloucestershire GL20 6DQ (the "property"). The deceased died on 6th May 2014. Mr Recorder Gardner QC decided, after hearing oral evidence, that the property should be transferred out of the deceased's estate to him, in exchange for payment of £385,000. £385,000 was the amount of a second valuation obtained by the appellant, Mrs Lynn Lewis, the deceased's daughter, executrix and sole beneficiary ("Mrs Lewis"). The second valuation was £45,000 more than the initial joint expert's valuation of the property of £340,000. Mr Justice Newey upheld the Recorder's decision in a judgment delivered on 18th July 2016.

3. On this second appeal, Mr Bernard Weatherill QC, leading counsel for Mrs Lewis, relied heavily on the 7-judge Supreme Court decision in *Ilott v. Blue Cross* [2017] UKSC 17 ("*Ilott*") delivered on 15th March 2017, some 8 months after Newey J's decision. He submitted that Lord Hughes' judgment in *Ilott* supported his argument that Mr Warner could not succeed in his application when he had failed to advance a case that he *needed* any financial provision for his maintenance out of the deceased's estate (being significantly financially better off than the deceased, and able to afford alternative accommodation), and all he had been able to say was that he would "*like*" to remain living in the property or that it was desirable for him to do so. That was, submitted Mr Weatherill, simply not enough to demonstrate that the deceased's will failed to make reasonable financial provision for his maintenance. Moreover, even though the provision of a house could, in some circumstances, amount to maintenance, paying more than full value for the property could not properly be regarded as reasonable financial provision for Mr Warner's maintenance out of the deceased's estate. There was no jurisdiction to make an order in respect of which value did not move from the estate to the applicant.

4. In response to these submissions, Mr Roger Evans, counsel for Mr Warner, pointed to the Recorder's decision that Mr Warner did have a need to stay in the property because of his age, disability, the length of time he had been there, the contributions he had made to the running costs of the property, and the help provided by his neighbours. The transfer of the property did, therefore, amount to reasonable financial provision for Mr Warner's maintenance. This was not a case where Mr Warner only "wanted" to stay; it was a case where he needed to do so, and the deceased had failed to make reasonable financial provision for his maintenance, by continuing to live in the property, in her will.

5. Before dealing with these competing positions, I shall need briefly to set out the factual background as determined by the Recorder, the relevant legislative provisions, the procedural chronology, and the passages from the judgments in *Ilott* upon which the parties rely. It is not actually necessary to look behind *Ilott*, because the relevant preceding cases are all referred to within Lord Hughes's seminal judgment.

6. Mr Weatherill sought to argue that we could revisit the facts, but in my judgment, in the absence of permission having been granted to appeal the factual findings of the

Recorder on the basis that they were perverse or such that no reasonable judge could have made, we must consider the matter on the basis of those findings and those findings alone.

The relevant factual background as found by the Recorder

7. In order to explain the relevant factual background, I can do no better than cite the following passages from the Recorder's judgment:-

> "13. There was no real dispute as to the relevant facts in this case. Mr. Warner, who is now aged 91 years, began living with the deceased, who was eight and a half years his junior, in about 1995, and they lived together in her house until her death nearly 20 years later. Having heard Mr. Warner, who clearly has all his mental faculties, and who I found to be a frank, direct and credible witness, and their neighbour, Mrs. Walton, I accept that during this time they lived as if husband and wife in all its aspects. … The deceased developed a form of dementia in 2012 and she went into a home for a short while, and then returned to the house with 24-hour care. Until her death the relationship between Mr. Warner and Mrs. Lewis and her husband was a friendly one.
>
> 14. Mr. Warner, who expected to die long before her, made a will leaving her a substantial sum. He frankly admitted that he would have been surprised if she had left him anything in her will that could not be found. He was quite clear that there was never any understanding that he would have any interest in her estate, nor did he claim any. Nor was there any understanding that he would be able to stay in the house or be able to purchase it in the event of her death. This was something that they never discussed. So far as their respective financial circumstances were concerned, Mr. Warner accepted that he was significantly better off than the deceased, and that he has the means to buy the house or alternative accommodation if necessary. During their time together Mr. Warner and the deceased shared the expenses of the house and he paid for the oil, which tended to be their largest outgoing.
>
> 15. When it became clear that the deceased was not going to survive, Mr. and Mrs. Lewis became concerned as to Mr. Warner's occupation of the house, and so drafted a declaration that he did not wish to make any claim for the house, which they asked him to sign. He said that he was not very happy that they felt unable to trust him but, as he was not making any claim on the house, he signed it. When they lost this and a typed replacement was prepared by Mr. Lewis, again he signed it.
>
> 16. The day after the death Mrs. Lewis asked him what he was going to do and he replied that he had better rent the house. She objected to him having his son to stay in the house whilst he grieved. She said she had been so advised by her insurance solicitors and she feared she might not be able to get the son out. There is no doubt that relations between the parties have deteriorated as a result of this litigation.
>
> 17. Mr. Warner said that he would be very unhappy and very stressed if he had to move from the house where he had spent the happiest 20 years of his life, and where he is lucky to have a doctor as a neighbour, Dr. Walton, who had arranged for him have an emergency button around his neck and is the first on call if he pushes it. Mrs. Walton confirmed that they keep an eye

on him and that he comes round to their house for about 10 minutes each morning. Mr. Warner described, dispassionately and without any attempt at exaggeration, his state of health. He has a very arthritic back and the main artery in his left leg is closed. He is on medication for problems with his small intestines which produces stomach pains and side effects. He has difficulties with his hands due to carpal tunnel syndrome. I was told, by reference to a plan at 2/456, that the house is in a location where Mr. Warner has lived his long life, including the house where he was born, his former matrimonial home, the Green, his caravan park, and the village shop to which he is able to walk. I accept all of this evidence.

18. As for Mrs. Lewis's intentions in relation to the house, it seems that her views have varied from time to time. In her witness statement she accepted that 7 days after her mother's death she had told Mr. Warner that she did not want him to rent it but that he could buy it at a price the estate agent would tell them. Her husband said he could buy it for £425,000 but he had rejected this as an overvaluation. This offer was repeated in a letter from Mr. Lewis to Mr. Warner's solicitors' on 16 May 2014, and Mrs. Lewis said that if he had accepted this, the house would probably have been sold to him.

19. In her evidence she said that she wanted the house to go on to the market to get the full market value. She said that she may want to extend it or improve it prior to sale, and Mr. Lewis said that it may increase in value if the sale was delayed, but agreed that this was solely his own assessment. She ended by saying that she was willing to sell the house to the highest bidder, including Mr. Warner, if he was that person."

The 1975 Act

8. Section 1 of the 1975 Act specifies the persons who may apply for relief under that Act and the grounds on which they may apply. In the extracts which follow, I have put in bold the subsections that are most directly relevant to what this court has to decide:-

"(1) **Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons…**

(a) the spouse or civil partner of the deceased;

(b) a former spouse or former civil partner of the deceased, but not one who has formed a subsequent marriage or civil partnership;

(ba) any person (not being a person included in paragraph (a) or (b) above) to whom subsection (1A) ... below applies; …

(e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased…

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.

(1A) This subsection applies to a person if the deceased died on or after 1st January 1996 and, during the whole of the period of two years ending immediately before the date when the deceased died, the person was living:-

(a) in the same household as the deceased, and

(b) as the husband or wife of the deceased. …

(2) **In this Act "reasonable financial provision"—**

(a) in the case of an application made by virtue of subsection (1)(a) above by the husband or wife of the deceased… means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance;

(aa) in the case of an application made by virtue of subsection (1)(a) above by the civil partner of the deceased… means such financial provision as it would be reasonable in all the circumstances of the case for a civil partner to receive, whether or not that provision is required for his or her maintenance;

(b) in the case of any other application made by virtue of subsection (1) above, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance. …

(3) For the purposes of subsection (1)(e) above, a person is to be treated as being maintained by the deceased (either wholly or partly, as the case may be) only if the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature."

9. Section 2 of the 1975 Act sets out the powers that the court has to make orders, as follows:-

"(1) Subject to the provisions of this Act, 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:**

(a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;

(b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified;

(c) an order for the transfer to the applicant of such property comprised in that estate as may be so specified;

> **(d) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified;**
>
> **(e) an order for the acquisition out of property comprised in that estate of such property as may be so specified and for the transfer of the property so acquired to the applicant or for the settlement thereof for his benefit;** …
>
> (4) An order under this section may contain such consequential and supplemental provisions as the court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between one beneficiary of the estate of the deceased and another …".

10. Section 3 of the 1975 Act provides for the matters to which the court is to have regard in exercising its powers under section 2 of the 1975 Act, as follows: -

> "(1) **Where an application is made for an order under section 2 of this Act, the court shall, in determining whether 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 such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say—**
>
> **(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**. …
>
> **(2A) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(ba) of this Act, the court shall, in addition to the**

> **matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to—**
>
> > **(a) the age of the applicant and the length of the period during which the applicant lived as the husband or wife of the deceased and in the same household as the deceased;**
> >
> > **(b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family**."

Procedural chronology

11. On 13th November 2014, Mrs Lewis obtained a grant of probate based on the deceased's reconstructed will. On 30th January 2015, Mrs Lewis brought a claim against Mr Warner in the Gloucester and Cheltenham County Court for (i) possession of the property on the ground of trespass and (ii) return of various items in the property (specifically furniture, chattels and personal property forming part of the deceased's estate) under the Torts (Interference with Goods) Act 1977.

12. On 13th February 2015, Mr Warner filed a defence to Mrs Lewis's claim. Separately, he applied for relief under the 1975 Act, and requested that the court make an order permitting him to continue living in the property. He claimed to fall within sections 1(1)(ba) and 1(1A) of the Act as, for a period of two years prior to the deceased's death, he had lived in the same household as the deceased, and as her husband.

13. The claims were heard on 21st and 22nd September 2015 by the Recorder. Mrs Lewis accepted that Mr Warner fell within sections 1(1)(ba) and (1A) of the 1975 Act and Mr Warner accepted that, if his claim under the Act failed, Mrs Lewis's possession claim would succeed. The Recorder delivered his judgment on 11th November 2015, and made his order on 30th November 2015. Apart from the factual findings I have already mentioned he held:-

    i) In paragraph 22, looking at the matter objectively, that maintenance of a roof over Mr Warner's head had meant that the deceased had provided him with 'maintenance', which had a financial value, within section 1(2)(b) of the 1975 Act, so that the failure of her reconstituted will to allow that to continue meant that she had failed to make reasonable financial provision for him. Accordingly, he could proceed to the second discretionary stage of deciding whether anything, and if so what, needed to be done about it, by balancing the interests of Mr Warner against those of Mrs Lewis as sole beneficiary.

    ii) In paragraph 23, that he took account of the specific matters referred to in section 3 of the 1975 Act including Mr Warner's physical disability, his age, the length of time that the property had been his home, the fact that Mr Warner had made contributions to the costs of the property during that time, the location of the property in the centre of a village where Mr Warner grew up and had lived all his life, and its location next door to neighbours who looked after Mr Warner's welfare, leading to the conclusion that the upheaval and likely consequences of Mr Warner having to move should be avoided if at all possible.

iii) In paragraph 24 in relation to the interests of the beneficiary, that it would be unreasonable for Mrs Lewis to have to wait until Mr Warner's demise to realise the value of the property (even though she and her husband owned a garden centre that was on the market for almost £1.4 million), that she wanted to sell the property by private treaty to realise its full value, and that Mrs Lewis had said she would be content if the court accepted the valuation of £385,000, and that by doing so the full value of the her interest would be realised.

iv) In paragraph 25, that Mrs Lewis should give Mr Warner an option for an appropriate period to purchase the property from the estate of the deceased for £385,000, so that Mr Warner would be able to continue living in the property for the rest of his life, with his son as a carer if and when necessary.

It is to be noted, however, that, notwithstanding the Recorder's reference to an 'option' in his judgment, he framed his order in terms of a transfer of the property which fell, of course, under section 2(1)(c) of the 1975 Act.

14. In his 30th November 2015 order, the Recorder also ordered that Mrs Lewis pay Mr Warner's costs on the standard basis (subject to a specific exemption), and that the furniture, chattels and personal property forming part of the deceased's estate should pass to Mrs Lewis and Mr Warner in accordance with an attached schedule.

15. On 11th February 2016, Newey J gave Mrs Lewis permission to appeal, and stayed the Recorder's order. Newey J heard the appeal on 21st June 2016, and gave judgment dismissing it on 18th July 2016. His basic reasons were in outline as follows:-

i) Although section 1(3) provides that a person is "maintained" only if the deceased contributes to their needs "otherwise than for full consideration", this only applies to applicants under section 1(1)(e). "Maintenance" for the purposes of section 1(2)(b) is not defined in the 1975 Act, and the courts have shied away from precise or comprehensive definition. Exceptionally, "maintenance" can encompass an arrangement for full consideration, and a person can be in need of it without being short of money, where money cannot secure them what they require. In the present case, Mr Warner's means could not secure him what he required, namely continued occupation of his home, because the deceased's will made no reasonable provision for him. The Recorder thus made no error of principle in holding that Mr Warner qualified for relief under the 1975 Act, and his 'value judgment' should be respected.

ii) The Recorder was entitled to order the transfer of the property to Mr Warner for full consideration. Mrs Lewis's submission that the Recorder should have ordered that Mr Warner pay her mesne profits for the period between the deceased's death and the transfer of the property was rejected, because the £385,000 valuation of the property was already generous to her (being £45,000 more than the value attributed to it by the parties' jointly instructed expert) and so there was no need to compensate her further.

16. On 27th July 2016, Newey J made an order dismissing Mrs Lewis's appeal and requiring her to pay Mr Warner's costs. He also ordered an interim payment of £11,000 on account of those costs, but stayed his order and the Recorder's order until after the determination of Mrs Lewis's second appeal (if she obtained permission).

17. On 13th January 2017, Floyd LJ granted Mrs Lewis permission to appeal to this court.

The issues

18. Although there are some ancillary issues that the parties have raised in the course of these long-running proceedings, there are really only two central questions for this court to determine. The first is whether the Recorder was right to conclude that the deceased's will did not make reasonable financial provision for Mr Warner's maintenance, and the second is whether the Recorder was entitled as a matter of law to make the order that he made under the 1975 Act.

19. Mrs Lewis suggested at various points that an appropriate alternative order might have been to give Mr Warner a life interest in the property, but ultimately neither party positively sought such an order. Finally, however, Mrs Lewis said that she ought to have been awarded mesne profits for the period prior to the transfer of the property to Mr Warner.

The *Ilott* decision in the Supreme Court

20. In *Ilott*, the claim for reasonable financial provision was made by the testatrix's only daughter, who had left home secretly to live with her boyfriend at the age of 17, and who, despite attempts at reconciliation, was estranged from her mother for the 26 years leading up to her death. The testatrix had said expressly that she felt no moral or financial obligation towards her daughter, so that she left her estate worth some £486,000 to charities. The daughter had 5 children and lived in modest circumstances on benefits. The District Judge awarded the daughter £50,000 out of the testatrix's estate. The Court of Appeal awarded the daughter £143,000 plus costs to buy her rented home. The Supreme Court restored the District Judge's order, allowing the appeal by the beneficiary charities.

21. Lord Hughes gave the leading judgment. The other 6 members of the court agreed with him, though Lady Hale (with whom Lords Kerr and Wilson agreed) gave a separate concurring judgment.

22. It is useful to recite some quite lengthy passages from Lord Hughes's judgment because (a) they are directly relevant to what this court has to decide, and (b) they provide the legal background without the need to trawl through the pre-existing authorities. Lord Hughes said this:-

> "1. 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 … 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.
>
> 2. The key features of the operation of the 1975 Act are four. First, it stipulates no automatic provision; rather the will (or the intestacy rules) apply unless a specific application is made to, and acceded to by, the court and a specific order for provision is made. Second, only a limited class of persons may make such an application; they are confined to spouses and partners (civil or de facto), former spouses and partners, children, and those who were actually being maintained by the deceased at the time of death. Third, all but spouses and civil partners who were in that relationship at the time of death can claim only what is needed for their maintenance; they cannot make a claim on the general basis that it was unfair that they did not receive any, or a larger, slice of the estate. Those three

features are laid down expressly in the 1975 Act. The fourth feature is well established by case law both under this Act and its predecessor of 1938. The test of reasonable financial provision is objective; it is not simply whether the deceased behaved reasonably or otherwise in leaving the will he did, or in choosing to leave none. Although the reasonableness of his decisions may figure in the exercise, that is not the crucial test. …

Maintenance

12. The concept of "reasonable financial provision" is thus, by the closing words of section 1(1), made central to the jurisdiction to depart from the will or intestacy rules, as the case may be. … In the case of all other applicants (apart from spouses and civil partners), however, section 1(2)(b) makes clear that reasonable financial provision means such provision as it would be reasonable for the applicant to receive *for maintenance*.

13. This 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. … For claims by persons other than spouses the maintenance limitation was to remain, and has done so. …

14. The concept of maintenance is no doubt broad, but the distinction made by the differing paragraphs of section 1(2) shows that it cannot extend to any or every thing which it would be desirable for the claimant to have. It must import provision to meet the everyday expenses of living. *In re Jennings, decd [1994] Ch 286* was an example of a case where no need for maintenance existed. The claimant was a married adult son living with his family in comfortable circumstances, on a good income from two businesses. The proposition that it would be reasonable provision for his maintenance to pay off his mortgage was, correctly, firmly rejected: see in particular at p 298F. The summary of Browne-Wilkinson J in *In re Dennis, decd [1981] 2 All ER 140* , 145–146 is helpful and has often been cited with approval:

> "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."

Thus in that case a claim against a large estate by an adult son failed when it was put as a claim for a capital sum to meet the capital transfer tax payable on a sizeable gift made to the claimant by the deceased during his lifetime, which gift the former had wasted away. The judge made the assumption, perhaps generously to the claimant, that bankruptcy would be likely if such a legacy were not directed, but that did not make the suggested sum provision for maintenance; the claimant was well able to work, despite a chequered history of drifting from occupation to occupation, and even if bankrupt was well capable of maintaining himself.

15. The level at which maintenance may be provided for is clearly flexible and falls to be assessed on the facts of each case. It is not limited to subsistence level. Nor, although maintenance is by definition the provision of income rather than capital, need it necessarily be provided for by way of periodical payments, for example under a trust. It will very often be more appropriate, as well as cheaper and more convenient for other beneficiaries and for executors, if income is provided by way of a lump sum from which both income and capital can be drawn over the years, for example on the Duxbury model familiar to family lawyers: see *Duxbury v Duxbury (Note) [1992] Fam 62* . Lump sum orders are expressly provided for by section 2(1)(b) . There may be other cases appropriate for lump sums; the provision of a vehicle to enable the claimant to get to work might be one example and, as will be seen, the present case affords another. As Browne-Wilkinson J envisaged (obiter) in In re Dennis (above) there is no reason why the provision of housing should not be maintenance in some cases; families have for generations provided for the maintenance of relatives, and indeed for others such as former employees, by housing them. But it is necessary to remember that the statutory power is to provide for maintenance, not to confer capital on the claimant. Munby J rightly made this point clear in *In re Myers [2005] WTLR 851* at paras 89–90 and 99–101. He ordered, from a very large estate, provision which included housing, but he did so by way not of an outright capital sum but of a life interest in a trust fund together with power of advancement designed to cater for the possibility of care expenses in advanced old age. 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.

Reasonable financial provision

16. The condition for making an order under the 1975 Act is that the will, or the intestacy regime, as the case may be, does not "make reasonable financial provision" for the claimant: section 1(1) . Reasonable financial provision is, by section 1(2), what it is "reasonable for [the claimant] to receive", either for maintenance or without that limitation according to the class of claimant. These are words of objective standard of financial provision, to be determined by the court. The Act does not say that the court may make an order when it judges that the deceased acted unreasonably. That too would be an objective judgment, but it would not be the one required by the Act.

17. Nevertheless, the reasonableness of the deceased's decisions are undoubtedly capable of being a factor for consideration within section 3(1)(g), and sometimes section 3(1)(d) . Moreover, there may not always be a significant difference in outcome between applying the correct test contained in the Act, and asking the wrong question whether the deceased acted reasonably. If the will does not make reasonable financial provision for the claimant, it may often be because the deceased acted unreasonably in failing to make it. For this reason it is very easy to slip into the error of applying the wrong test. It is necessary for courts to be alert to the danger, because the two tests will by no means invariably arrive at the same answer. …

18. The right test was well set out by Oliver J in *In re Coventry, decd [1980] Ch 461* , 474–475 in a passage which has often been cited with approval since:

> "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."

19. Next, all cases which are limited to maintenance, and many others also, will turn largely upon the asserted needs of the claimant. It is important to put the matter of needs in its correct place. … For all other claimants [apart from spouses and civil partners], need (for maintenance rather than for anything else, and judged not by subsistence levels but by the standard appropriate to the circumstances) is a necessary but not a sufficient condition for an order. Need, plus the relevant relationship to qualify the claimant, is not always enough. In *In re Coventry* the passage cited above was followed almost immediately by another much-cited observation of Oliver J, at p 475:

> "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."

20. Oliver J's reference to moral claim must be understood as explained by the Court of Appeal in both *In re Coventry* itself and subsequently in *In re Hancock*, where the judge had held that there was no moral claim on the part of the claimant daughter. There is no requirement for a moral claim as a sine qua non for all applications under the 1975 Act, and Oliver J did not impose one. He meant no more, but no less, than that in the case of a claimant adult son well capable of living independently, something more than the qualifying relationship is needed to found a claim, and that in the case before him the additional something could only be a moral claim. That will be true of a number of cases. Clearly, the presence or absence of a moral claim will often be at the centre of the decision under the 1975 Act. …

22. Nor, if the conclusion is that reasonable financial provision has not been made, are needs necessarily the measure of the order which ought to be made. It is obvious that the competing claims of others may inhibit the practicability of wholly meeting the needs of the claimant, however reasonable. …

23. It has become conventional to treat the consideration of a claim under the 1975 Act as a two-stage process, viz (1) has there been a failure to make reasonable financial provision and if so (2) what order ought to be made? That approach is founded to an extent on the terms of the Act, for it addresses the two questions successively in, first, section 1(1) and 1(2) and, second, section 2 . In *In re Coventry [1980] Ch 461*, 487 Goff LJ referred to these as distinct questions, and indeed described the first as one of value judgment and the second as one of discretion. However, there is in most cases a very large degree of overlap between the two stages. Although section 2 does not in terms enjoin the court, if it has determined that the will or intestacy does not make reasonable financial provision for the claimant, to tailor its order to what is in all the circumstances reasonable, this is clearly the objective. Section 3(1) of the Act, in introducing the factors to be considered by the court, makes them applicable equally to both stages. Thus the two questions will usually become: (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 for him? …

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 … 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 …".

23. Mr Weatherill also relied on Lady Hale's comment at paragraph 65(2) of her judgment to the effect that "[i]t is difficult to reconcile the grant of an absolute interest in real property with the concept of reasonable provision for maintenance: buying the house and settling it upon her for life with reversion to the estate would be more compatible with that. But the court envisaged her being able to use the capital to provide herself with an income to meet her living costs in future".

Was the Recorder right to conclude that the deceased's will did not make reasonable financial provision for Mr Warner's maintenance?

24. Mr Weatherill's central submission, as I have said, was that the evidence before the Recorder was insufficient to demonstrate that the deceased's will failed to make reasonable financial provision for Mr Warner's maintenance, when Mr Warner only said he would like to continue to live at the property, and did not need **the** property, only **a** property (which he could afford).

25. There are clear indications in Lord Hughes's judgment in *Ilott* to the effect that the broad concept of "maintenance" in section 1(2)(b) of the 1975 Act can extend to the provision of a house in which the applicant can live, albeit that it might most often be provided by way of a life interest (see paragraphs 14-15 of *Ilott* cited above). Moreover, the requirement for the objectively established "financial needs of the claimant" (within subsection 3(1)(a)) to be ascertained are dealt with at paragraph 19 of *Ilott*: the need for maintenance rather than for anything else, and judged not by subsistence levels but by the standard appropriate to the circumstances, is a necessary but not a sufficient condition for an order. The balancing of these financial needs against the needs of others mentioned in subsection 3(1)(b) and (c) and the other non-financial factors in section 3 is an exercise highly individual to each case and requires a value judgment by the trial judge, with which an appellate court should only interfere if there has been an error of principle or law (paragraph 24 of *Ilott*).

26. The problem for the appellant in this case is, as it seems to me, that the Recorder did indeed find that Mr Warner was being maintained by the deceased (see paragraphs 21-22 of his decision) in that she was providing the roof over his head. Moreover, he also held, in effect, that, taking into account the matters referred to in section 3 of the 1975 Act, Mr Warner needed that maintenance to continue, rather than requiring him to move house (see paragraph 23 of his decision).

27. Here, as in all cases, the interests of the beneficiary had to be balanced against the claims of the applicant. That is precisely what the Recorder did, and he concluded that Mr Warner's needs (not his wishes), as he in effect identified them in paragraph 23 of his decision, outweighed the proper interests of the beneficiary (as identified in paragraph 24 of his decision). For my part, I do not disagree with the Recorder's evaluation. I take full account of the strictures of the Supreme Court as to the freedom of testamentary disposition.

28. I am sure it was correct to say that Mr Warner had no expectation, or understanding with the deceased, that he would be able to continue living in the property after her death. That does not affect the fact that he was being maintained up to her death, and that he needed that maintenance to continue. Even if the deceased made a conscious decision not to make provision for Mr Warner to stay in the property after her death, she may have made that decision when she was not fully apprised of what his age and infirmity would be at the moment of her death (as was recognised by Lord Hughes in paragraph 17 of his judgment in *Ilott*). What is important is that, in the event, it was shown that the will of the deceased did not, taking into account all the relevant circumstances, make reasonable financial provision for Mr Warner's maintenance after her death. This is not a matter of what might have been sensible or desirable. It is a matter of Mr Warner's objectively assessed needs (see paragraphs 18-19 of Lord Hughes's judgment in *Ilott*).

29. Although whether or not the applicant has a moral claim is often central to decisions under the 1975 Act (see paragraph 20 of *Ilott*), and although Mr Warner accepted that he had no such claim, this was a case where, in the Recorder's evaluation, the absence of a moral obligation was outweighed by what was required to preserve the status quo for a very old and infirm person, who had been kept in a suitable house by the deceased for the nearly 20 years of their relationship. Even if Mr Warner did not 'think' he had a moral claim, the question of whether the deceased has made reasonable financial provision for Mr Warner's maintenance has, as I have said, to be evaluated objectively, and it is clear that the Recorder undertook the appropriate balancing exercise under the 1975 Act.

30. In my judgment, the Recorder was fully entitled to reach the conclusion, on the evidence, that the deceased's will did not make reasonable financial provision for Mr Warner's maintenance.

Was the Recorder entitled as a matter of law to make the order that he made under the 1975 Act?

31. In these circumstances, it seems to me that the appeal boils down to an argument as to whether it can properly be regarded either as "maintenance" or as "reasonable financial provision" under sections 1(1) and 1(2)(b) of the 1975 Act for an order to be made requiring the estate of the deceased to transfer the property to the applicant at full value. Mr Weatherill submitted that providing for Mr Warner to pay full value was not properly to be regarded as reasonable financial provision for maintenance.

32. In the course of argument, I asked Mr Weatherill where, in his submission, the line was to be drawn? Would, I asked, it be an admissible order to order a transfer at even £1 below value, but not at or above value? That, in the end, was his submission. But, in my judgment, the answer cannot be right. If it is indeed maintenance to provide a house for an applicant in Mr Warner's position, why should the exact amount of the purchase price matter? It was common ground that an order can be made under section 2(1)(c) of the 1975 Act which requires the transfer of a house to the applicant in return for some financial consideration. It does not seem to me to be a requirement of the 1975 Act that, in any particular method of reasonable financial provision for the applicant's maintenance, consideration should move away from the estate. There may be occasional cases in which the applicant's needs are for some *in specie* property, and where the precise financial value of that property is less important to the applicant than the property itself. This is just such a case. Once it was established that the deceased was indeed maintaining Mr Warner by providing for him to live with her in the property, it seems to me to follow inexorably that an order *could*, in theory, be made for that "maintenance" to continue, all other requirements of the 1975 Act being satisfied.

33. Moreover, I do not think there was anything wrong with the transfer order that the Recorder made in the exceptional circumstances of the case. Mrs Lewis was happy to sell the property to anyone for full value, and the sale ordered gave her full value. It is unnecessary for this court to speculate as to why she was not content with the order that was made. What matters is that the order that was made was entirely permissible and indeed appropriate under the 1975 Act. An order of such a kind is certainly likely to be unusual, but it should not be ruled out on grounds of jurisdiction. No doubt, had Mr Warner been younger and less infirm when the deceased died, he would indeed have been required to move out of the property and buy himself another one, as he could well have afforded to do. But here, the Recorder plainly thought that requiring

him to do so, in the all the actual circumstances pertaining at the time of the hearing, should be avoided. He balanced the interests of the beneficiary. The Recorder was entitled to reach that conclusion, applying the tests so clearly expounded (albeit after his decision) in Lord Hughes's speech in *Ilott*. As I have already said, neither side pressed for Mr Warner to be given a life interest in the property as opposed the transfer order that was made.

34. I am also unimpressed by the suggestion that the Recorder was at fault in not ordering mesne profits for the period from the deceased's death to the date of the transfer of the property. He reached a sensible pragmatic solution, with which Newey J expressly agreed. I also agree.

Conclusion

35. In my judgment, both the Recorder and Newey J were entirely justified in making the orders they did, and I would dismiss this appeal.

Lord Justice McCombe:

36. I agree.

Lady Justice Asplin:

37. I also agree.