Neutral Citation Number: [2015] EWCA Civ 797

Case No: B3/2014/2886

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
FAMILY DIVISION
Mrs Justice Parker
FD06F00810

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2015

Before :

LADY JUSTICE ARDEN
LORD JUSTICE RYDER
and
SIR COLIN RIMER

- -

Between :

Ilott	**Appellant**
- and -	
Mitson	**1st Respondent**
Michael Peter Lane (personal representatives of Melita Jackson deceased)	**2nd Respondent**
The Blue Cross Animal Welfare Charity	**3rd Respondent**
Royal Society for the Protection of Birds	**4th Respondent**
Royal Society for the Prevention of Cruelty to Animals	**5th Respondent**

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Brie Stevens-Hoare QC and John Collins (instructed by **Bar Pro Bono Unit**) for the **Appellant**
Penelope Reed QC (instructed by **Wilsons Solicitors**) for the **Third to Fifth Respondents**
The **First and Second Respondents** did not appear and were not represented

Hearing date: 3 July 2015

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Approved Judgment

LADY JUSTICE ARDEN :

OVERVIEW

1. This appeal is about the quantification of an award for maintenance pursuant to the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"). On 7 August 2007, DJ Million made an award of £50,000 in favour of the appellant, the adult child of the deceased. On 3 March 2014, Parker J ([2014] EWHC 542 (Fam), [2015] 1 FLR 291) dismissed her appeal from that order. The issues on this appeal are whether the order of DJ Million should have been set aside for error, and, if so, and this court decides to re-exercise the discretion, whether reasonable financial provision can and should be made for the appellant's maintenance which relieves her everyday living expenses without affecting her state benefits. The latter is the crucial question of law, and I answer it in paragraphs 59 and 60 below.

2. The appellant's claim under the 1975 Act relates to the estate of her late Mother, Mrs Melita Jackson. She died on about 29 June 2004 leaving net estate valued at the date of the hearing before DJ Million at £486,000. Mrs Jackson left a will in which, subject to a legacy of £5,000 in favour of the BBC Benevolent Fund, she left her entire estate to be divided between The Blue Cross, the Royal Society for the Protection of Birds and the Royal Society for the Prevention of Cruelty to Animals ("the Charities"). The appellant was the only child of Mrs Jackson. She and her mother had been estranged for some 26 years and the appellant knew that Mrs Jackson intended not to leave her any of her estate in her will.

3. Under the 1975 Act, the court must, before proceeding to quantification, answer a threshold question, namely whether the will was not such as to make reasonable financial provision for the appellant. The judgment of DJ Million dated 7 August 2007 dealt with both the threshold point and quantification. He decided the threshold point in the appellant's favour. On appeal to the High Court, King J set aside his decision on that point but did not deal with the quantification issue. This court ([2011] 2 FCR 1) (Sir Nicholas Wall P, Arden and Black LJJ) allowed an appeal against the order of King J, restored the order of DJ Million and remitted to the High Court an appeal against the decision of DJ Million on quantification. That was the appeal that was dismissed by Parker J.

4. The first two respondents are the executors of Mrs Jackson's will. They are not represented on this appeal. The Charities are also respondents to this appeal and are represented by Ms Penelope Reed QC.

5. In my judgment, for the reasons given below, the exercise of discretion by DJ Million was erroneous in law and should be set aside. Among other reasons, DJ Million assumed the consequential loss of state benefits. That assumption undermined the logic of his order since on this assumption (which was correct) she would lose in income terms a greater amount in state benefits that she would gain by the award made by his order.

6. I consider that reasonable financial provision can only be made for this appellant by providing her with the sum that she requires to buy her home. At the date of the hearing before the judge, the acquisition price was £186,000 but this has since been reduced to £143,000. I would order this sum and the amount of the reasonable costs

of acquisition. I would additionally award her an option to take a further maximum capital sum of £20,000 to provide an immediate capital sum from which further income needs can be met. I have expressed the award in these terms in order to preserve her state benefits.

7. In this judgment, I shall

A. Set out the material provisions of the 1975 Act

B. Explain the history of the appellant's relationship with the deceased

C. Summarise the judgments of DJ Million and Parker J

D. Explain the award sought by the appellant

E. Set out the issues which require to be decided

F. Deal with Issue (1) (the error made by DJ Million) and conclude that the lump sum award of £50,000 must be set aside

G. Deal with Issue (2) (remit to High Court or re-exercise discretion) and conclude that this court should re-exercise the discretion as to quantification

H. Deal with Issue (3) (re-exercise of discretion) and conclude that the appellant should be awarded the cost of acquiring her home and the sum of £20,000

I. Restate my overall conclusion.

A. RELEVANT PROVISIONS OF THE 1975 ACT

8. Section 1 of the 1975 Act confers the right on, among others, a child of the deceased to apply for an order under section 2 of the 1975 Act if the will of the deceased or the intestacy rules do not make reasonable provision for her.

9. Section 1(2) of the 1975 Act provides that, in the case of a child, "reasonable financial provision" means:

> such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive *for his maintenance*. (emphasis added)

10. This provision is, therefore, limited to awards of maintenance. By contrast awards under the 1975 Act for spouses or civil partners are not so limited. The 1975 Act does not define maintenance, but the parties did not seek to disagree with the DJ Million's ruling that any award had to meet income need and be "income-based". The Charities took us to the following passage in the judgment of Browne-Wilkinson J in *Re Dennis dec'd* [1981] 2 AER 140 at 145-6, which interprets the word "maintenance" in the 1975 Act and explains its relationship to standard of living:

> It is now clearly established that claims under the Act by persons other than spouses are limited to maintenance. The applicant has to show that the will fails to make provision for

> his maintenance: see *Re Coventry (deceased)* [1979] 2 All ER 408, [1980] Ch 461; *affd* [1979] 3 All ER 815, [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 *Re Christie (deceased)* [1979] 1 All ER 546, [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 him to continue to carry on a profit-making business or profession may well be for his maintenance. (emphasis added)

11. Section 2 of the 1975 Act provides in material part:

> 2 (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;….

12. When determining whether the will is not such as to make reasonable financial provision for the claimant, the court must have regard to the factors set out in section 3, which are the same factors as those to which it must have regard when determining whether the will makes adequate provision for the claimant. Section 3, so far as applicable, provides:

> 3 (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…

13. There are two further sub-sections of section 3 which are important in this case.

14. First, sub-section (5) stipulates that the court must take into account the facts as known at the date of the hearing:

> (5) 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.

15. Section 25 of the 1975 Act defines "the court" as meaning, unless the context otherwise requires:

> "*the court*" means unless the context otherwise requires the High Court, or where the county court has jurisdiction by virtue of section 25 of the County Courts Act 1984 , the county court ;

16. Ms Brie Stevens-Hoare submits that, if re-exercising the discretion conferred by section 2, this court should have regard to the facts at the date of the hearing before the county court so that this court should use values as at August 2007 (the date of DJ Million's order) even if they have changed. I do not consider that can be right. If "the court" includes this court at all, the date of hearing is the date of the hearing of this appeal, not any earlier date.

17. Second, sub-section (6) provides that the court must have regard to a claimant's earning capacity and to any obligations or responsibilities she may have:

> (6) In considering the financial resources of any person for the purposes of this section the court shall take into account his earning capacity and in considering the financial needs of any person for the purposes of this section the court shall take into account his financial obligations and responsibilities.

B. APPELLANT'S MARRIAGE, CHILDREN AND ESTRANGEMENT FROM HER MOTHER (THE DECEASED)

18. The primary reason why Mrs Jackson made no provision in her will was that she was estranged from the appellant and it is necessary to understand how this came about.

19. The appellant 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 the appellant was born. His employer made a substantial payment to Mrs Jackson which she used to pay off the mortgage on the home. She was brought up by her mother.

20. 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. Throughout her marriage she has lived with her husband at 16 Edward Cottages, Great Munden, Ware, Hertfordshire ("the Property").

21. Mr Ilott and the appellant have five children. At the time of the trial, two were under 18. At the date of the second hearing before this court, only one of their children lived at the Property but she is shortly going to University away from home. The Property is rented from a housing association but Mr Ilott and the appellant have the right to buy it at a discounted price, held at £143,000 until the end of July 2015. For

reasons not explained to us, there had been a substantial drop in the value of the Property.

22. The appellant and Mrs Jackson were estranged. There were three attempts at reconciliation, all of which failed. On the last occasion, it failed because Mrs Jackson took offence that the fifth child had been given the name of the appellant's paternal grandmother, whom Mrs Jackson did not like. I do not intend to go through the evidence about responsibility for the estrangement. It is enough to say that 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.

23. When Mrs Jackson died, she left a will made in April 2002 which made no provision for the appellant or any member of her family. It is 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. There has been little change in that amount since the date of the hearing before DJ Million.

C. JUDGMENTS OF DJ MILLION AND PARKER J (FIRST APPEAL)

24. DJ Million found that Mrs Jackson had unreasonably excluded the appellant from any financial provision in her will despite the appellant's obviously straitened and needy financial circumstances. The failure to make any provision for her produced an unreasonable result having regard to the appellant's straitened circumstances.

25. DJ Million then considered the amount to be awarded to the appellant. I have set out the complete passage from his judgment in the annex to this judgment. In my judgment, DJ Million's reasoning was as follows:

    i) He first directed himself that any capitalised sum must be based on an income need.

    ii) He rejected the Charities' submission that a capital fund of £3,000-£5,000 was sufficient. He considered that this sum would be too small.

    iii) He rejected the claimant's claim which on analysis exceeded the size of the estate. The appellant sought £186,000 to purchase the family home, £53,000 to pay for a single storey extension to the house, a capitalised sum equivalent to an income of £10,000 and a further capital sum to permit refurbishment and re-equipment of the house, which might amount to £40,950. The district judge then rejected the claim for a sum to purchase the house. He held that maintenance had to be income based. That led him to focus on the amount that would be saved by purchasing the house. He held that the maximum amount saved would be £912 per year being the net amount of the rent paid by the family after housing benefit.

    iv) He then rejected the claim for a capitalised sum of £10,000 per year for life. He said that there were no figures to show the net effect which took into account the state benefits which the family received. He assumed that the practical consequences of such a large capital payment would be

that the family lost most if not all of their benefits. He added "none of these consequences appeared to have been thought through."

v) At this point in his judgment, having rejected the claim, he went on to make his own calculation. He held first that the appellant had some earning capacity but that would not be enough to meet her financial needs. He took her share of the tax credits and held that they could be said to indicate the amount of maintenance which the government accepts as being needed by her to provide her with a reasonable but basic standard of living. DJ Million therefore took the level of state benefit as the ceiling on the amount that he could award for the appellant's maintenance.

vi) He therefore rejected the argument put forward by the Charities which appeared to have been that the appellant's income is in any event already met by state benefits and should not be replaced by provision out of the estate of Mrs Jackson.

vii) Having done that, DJ Million then looked at the "At A Glance" tables for 2007-8 and concluded that the sum of approximately £69,200 would be required to provide the appellant with an income of £4,000 per year. He held that this was the appropriate level of financial provision because of the appellant's earning capacity. He took into account that such work would be poorly paid and that she would be likely to continue to require state subsidies for her basic living expenses.

viii) Having made that calculation he capitalised the maintenance figure at the lower sum of £50,000. He emphasised that this had a significant degree of approximation in it but represented the best that he was able to do in the circumstances of the case.

26. On appeal, Parker J admitted evidence relating to the appellant's husband's attendance at spiritual meetings which was a further source of income. It appears to have been common ground that this income was small and thus made no real difference to the case. Parker J also admitted in evidence a letter from Mrs Jackson to her relatives confirming that the source of funds used to clear the mortgage on her home, which constituted about half the estate, was a payment made by her husband's employer after his death. This evidence has given rise to argument about whether weight should be attached to the fact that this fund was so derived and whether it was to be inferred that it was intended for the appellant's benefit.

27. In the course of her judgment, Parker J observed that as a result of the appellant's straitened circumstances the appellant had never had a holiday, had difficulty affording clothes for the children and was limited in the food she could buy and that much of what she had was old or second-hand (Judgment of Parker J paragraphs 45 to 46).

28. Parker J recognised that the appellant might have to spend the major part of the award so as to reduce her total capital to £16,000 and retain state benefits, and that DJ Million "did not specifically [take this] into account." Nonetheless she concluded that

DJ Million had not made any error (see paragraphs 52 to 54 of her judgment) for three reasons:

i) the lack of analysis about the effect of the award on state benefits did not render his decision wrong because he was not given the necessary material to assess that effect.

ii) DJ Million was entitled to take the view that, since the appellant and her husband had managed for many years on their limited resources, their straitened circumstances did not justify any award.

iii) The appellant's contention that she could only benefit from the award if her housing costs were met could not be the right approach because "[o]therwise [DJ Million's] determination that the lack of expectation tempered the award would be rendered meaningless."

D. AWARD SOUGHT BY THE APPELLANT

29. The appellant seeks sufficient funds to acquire the Property and some capital to meet non-housing needs (£50,000). By purchasing the house, the appellant would be relieved of a total liability of £4,793 per year. It would also allow the appellant to move to somewhere with cheaper and more effective public transport and employment prospects and give her a pension whether by an equity release arrangement or letting the premises.

30. If she fails on that claim, the appellant seeks an award that provides for something above her basic needs so that she can renew and replace items as they age and break, and can also have occasional holidays. She submits that, having regard to the reduction in her standard of living resulting from living within their means and the omission of housing and council tax benefit from the judge's calculations, a significant increase in the award is required to provide for even a measured improvement in the appellant's straitened circumstances.

E. ISSUES TO BE DECIDED ON THIS APPEAL

31. In my judgment, the following issues arise:

Issue (1): Are there any errors in the reasoning of DJ Million on financial provision which mean that this court should set his judgment aside?

Issue (2): If so, should this court re-exercise the discretion of DJ Million or remit the matter once more to the trial court?

Issue (3): If this court is to re-exercise the discretion, how should it do so?

F. *ISSUE (1):* ARE THERE ANY ERRORS IN THE REASONING OF DJ MILLION ON FINANCIAL PROVISION WHICH MEAN THAT HIS AWARD SHOULD HAVE BEEN SET ASIDE?

32. *Standard of review*: It is common ground that the appropriate standard of review is that applying to the exercise of a discretion. That means that DJ Million must be shown either to have made an error of law, for instance by applying the wrong test or failing to take into account matters that he should have considered, or taking into account matters he should not have considered, or reaching a conclusion that was perverse. If there was a reviewable error in his judgment, the conclusion of Parker J on appeal was also in error.

33. *Errors in judgment of DJ Million:* Ms Stevens-Hoare contends that the judgment of DJ Million on quantification of an award contains many errors. She submits that:

    i) DJ Million wrongly equated reasonable provision with sums paid in respect of state benefits. He then made a provision to replicate the appellant's existing state benefits, or what he deemed to be her share of the benefits, rather than improving her financial circumstances (paragraph 79).

    ii) DJ Million failed to analyse what the appellant reasonably required by way of maintenance other than by analogy with state benefits and produced the result which meant in practice that her maximum benefit from the award would only be £16,000 less any savings she had.

    iii) DJ Million was wrong to ignore the fact that half the estate was derived from death-in-service compensation paid to the deceased upon and because of the death of her husband and the appellant's father.

    iv) DJ Million was wrong to conclude that provision should not be made to enable the purchase of the Property as it would only relieve the appellant of expenditure of £912 per year. It would in fact also relieve the appellant of the liability for £4,793.33 in rent each year.

    v) DJ Million was wrong to confine her needs to 50% of the family benefits. Her real needs were higher because it is well known that two people can live more cheaply than one. He ought to have taken her needs as if she were a single person.

    vi) DJ Million was wrong not to seek further information to clarify the effect of any award on state benefits.

34. To my mind there are two fundamental errors which of themselves lead me to conclude that the award should be set aside. I can leave the other matters contended for by Ms Stevens-Hoare until I have considered whether this court should make the new award. If it should, the further submissions can be dealt with when a new award is made.

35. The two fundamental errors in my judgment are these. First, at the end of para 67 of his judgment (see annex), DJ Million states that because of the appellant's lack of expectancy and her ability to live within her means, her award should be "limited". In the paragraphs which follow he does not state how he has limited the award to reflect those matters. Parker J simply assumed that those were the reasons why DJ Million had rejected the appellant's claim for a lump sum that would enable her to buy her

home. Those matters might justify a less generous award than would otherwise be made, but, even if that was so, it was wrong in law to state that the award had been limited for those reasons without explaining what the award might otherwise have been and to what extent it was limited by the matters in question. It was a situation in which reasons were required so that the appellant could consider whether the reductions were excessive (which might give her an arguable error for the purposes of any appeal), and it is of the essence of a judicial decision that adequate reasons are given on material matters. I deal below with the questions whether there should have been a reduction in the award because of her ability to live within her means or because of her lack of expectation.

36. The second fundamental error in my judgment is this. The judge was required to calculate financial provision for the appellant's maintenance. Yet he did not know what effect the award of £50,000 would have on her state benefits. He made a working assumption at the end of para 74 of his judgment that the effect of a "large capital payment" (which would include an award such as he ultimately made) would disentitle the family to most if not all of their state benefits. Failure to verify this assumption undermined the logic of the award.

37. Could he have verified the effect? Ms Penelope Reed QC, for the Charities, submits that DJ Million had to do the best he could on the evidence before him. At trial, the appellant did not provide DJ Million with adequate material. So she submits in effect that the appellant has only herself to blame if DJ Million had to adopt a rough and ready approach, and she should not have a second bite at the cherry. The appellant did not produce a budget but simply a wish list and this court must determine the matter as at the date of trial on the basis of the evidence available to DJ Million. She submits that DJ Million was not presented with evidence or legal argument on the impact of the award so far as benefits were concerned.

38. I do not consider that it is correct to say that the appellant failed to produce a "budget". There are in the appeal bundle two documents showing monthly expenses, as well as the document which Ms Reed calls a wish list. Once that evidence was produced, the fact that DJ Million's award would lead to a loss of benefits was a matter to be deduced from the regulations governing benefits. The appellant does not, in my judgment, rely on *evidence* as to legal entitlement. She has provided evidence of her income, and so her entitlement to state benefits is a matter of law. Of course, if there had been a need for fresh evidence, I would have to consider whether such evidence could be adduced on appeal even though it was not adduced at trial.

39. DJ Million had the basic information he needed to verify the assumption. He knew the breakdown of the state benefits. He found that, at the date of the hearing, the appellant received tax credits and benefits of £13,204 per year consisting of £8,112 tax credit, plus £5,092 housing and council tax benefit (Judgment para 23).

40. The appellant's skeleton argument in support of her application for permission to appeal stated that the decision of the district judge "produced the result which meant in practice that the claimant's maximum benefit from the award would only be about £16,000 less any savings the claimant had." (Paragraph 2(d) of the skeleton argument of Mr Collins, a submission which is reflected in the reasoning of Parker J). The skeleton argument does not state how this is calculated but it is clear as a matter of law that the appellant would lose the right to claim any housing benefit or council tax

benefit once she had capital exceeding £16,000 unless it was invested in her dwelling. (It would follow that the value of the sum would be reduced by any further savings she had). This is because neither housing benefit nor council tax benefit is available if the claimant has in excess of £16,000 in capital (section 134 Social Security Contributions and Benefits Act 1992; Housing Benefit Regulations 2006 reg. 43, Council Tax Benefit Regulations 2006 reg. 33).

41. Ms Stevens-Hoare submits that DJ Million had an inquisitorial function and could have asked for this information. Ms Reed disputes that the function is inquisitorial. I do not intend to adopt a label that was not fully explained by either counsel in submissions. It is simply obvious that if the judge did not understand the effect of his calculations he should have asked for some help from the parties. He could if necessary have done this after the hearing.

42. Parker J relied on the fact that even if the appellant lost her benefits she would have had the opportunity to bring her capital down to £16,000 and then claim benefits. The parties have not made submissions on that course of action as a means of preserving benefit entitlement, but the fact that the appellant would on this basis have £34,000 to spend enabled Ms Reed to contend that the award was of benefit to the appellant. But, even if there was nothing to stop the appellant reducing her capital in this way and even though she would thereby benefit, it is difficult to see how that supports DJ Million's award. To be within the 1975 Act, the award had to be for the appellant's future maintenance, not for an immediate, major spending spree. The award of £50,000 was intended to represent an annual income of £4,000. The appellant would receive the benefit of this entitlement if she did not spend the award, but it is less than the housing and council tax benefit which she currently receives.

43. The same points do not apply to the tax credits. It is not clear whether the £8,112 tax credits payable to Mr Ilott and the appellant were in respect of child tax credit or working tax credit or both, but the difference is immaterial. Capital is ignored for the purposes of means testing both of them (see *Tolley's Social Security and State Benefit*, paras 10A.11 and 10A.14). The appellant's tax credits would therefore have been unaffected by DJ Million's award, a point which the appellant accepted in her skeleton argument in support of her appeal.

44. Accordingly, I would set aside the award made by DJ Million and proceed to the next issue.

G. *ISSUE (2):* SHOULD THIS COURT RE-EXERCISE THE DISCRETION TO MAKE AN AWARD OR REMIT THE MATTER TO THE TRIAL COURT?

45. In my judgment, there is no doubt that this court is in a position to and should proceed to re-exercise the discretion to make the award in favour of the appellant. The parties did not seek to persuade us not to do this. This is a case where there has been an exceptional lapse of time between the making of the claim and this appeal. In addition, neither party suggested that there was any further evidence that we needed before making the award. I therefore proceed to the third issue.

H. *ISSUE (3):* HOW SHOULD THIS COURT RE-EXERCISE THE DISCRETION?

46. I now turn to the parties' respective submissions on each of the factors in section 3 of the 1975 Act in turn. In determining the amount of an award, the court is required to have regard to the factors listed in section 3(1). I will, however, leave out the resources and needs of any other applicant (section 3(1)(b)) and disability (section 3(1)(f)), which are not applicable on the facts of this case. I shall also leave the resources and needs of the appellant - until last.

47. *Resources and needs of the Charities (section 3(1)(c):* The Charities do not make any case that they have resources and needs to be taken into account and so Ms Stevens-Hoare rightly submits that there is nothing to be taken into account here. For the Charities, any money from this estate is a windfall.

48. *Mrs Jackson's obligations and responsibilities to the appellant (section 3(1)(d)):* Ms Stevens-Hoare submits that the ordinary family obligation weighs to some extent in her favour under section 3(1)(d) but she accepts as she is bound to do that the fact that Mrs Jackson had no responsibility for her as an adult child living independently weighs against her.

49. Ms Reed makes that point and submits that cases where adult children have been successful have all involved special circumstances or moral obligation on the part of the deceased. This is no longer the law: see *Re Hancock (dec'd)* [1993] 1 FCR 500. Ms Reed referred us to a large number of cases, but they turn on their facts and do not in my judgment provide much, if any, assistance on this appeal: *Re Goodchild* [1996] IWLR 694, *Re Pearce* [1998] 2 FLR 705, *Espinosa v Burke* [1999] 3 FCR 76 and *Myers v Myers* [2004] EWHC 1944 (Fam). It is enough for Ms Reed's purposes that the appellant is an adult child living independently. That factor has to be taken into account. At minimum that means that the court is not concerned to provide her with an income that would fully support her needs.

50. *Size and nature of the estate (section 3(1)(e)):* Ms Stevens-Hoare submits that the size of the estate does not impinge on the award which the appellant now seeks. That is clearly so.

51. *Any other relevant matter (apart from resources and needs of the appellant) including the appellant's conduct (section 3(1)(g):* A number of matters were raised under this head:

    i) *No penalty for living within means*: Ms Stevens-Hoare submits that when assessing the value of the claim it is wrong to weigh against the appellant the fact that she had been living in straitened financial circumstances. She submits that Neuberger J, as he then was, in *Re Watson* [1999] 1 FLR 878 at 890 rightly rejected the idea that a claimant has no need for the purposes of the 1975 Act if she has been living within her means:

        > …just because the person manages to live within his or her income does not mean that that income fulfils all his or her "needs" or "requirements" let alone "reasonable requirements".

Ms Stevens-Hoare submits that this is the correct principle and that Parker J was wrong to distinguish this case as resting on very different circumstances (see judgment of Parker J at para 46). Ms Reed contends that *Re Watson* is distinguishable for the reason which Parker J gave and does not establish any principle. I agree that the existing means are not conclusive as to the appropriate level at which a claimant is entitled to be maintained.

ii) *Father's employer's payment*: Ms Stevens-Hoare submits that the fact that the matrimonial home equates to about half the estate and was derived from the appellant's father's efforts rather than her mother's was a factor that should be weighed in the appellant's favour as it must have been partly intended for her. On Ms Reed's submission, the appellant's father's employer's payment can have no impact on the award under the Act. It engages none of the section 3 factors. Ms Reed submits that the fact that the deceased derived part of her estate from the bounty of her husband's employer was irrelevant. The judge correctly distinguished *Re Callaghan* [1985] Fam 1 where the stepchild had been very close to her stepfather and cared for him dutifully towards the end of his life to the detriment of her own circumstances. In that case the court awarded the daughter the house in which the deceased had lived which had been left to him by the daughter's mother. As Parker J said, at paras 40-41 of her judgment, there was nothing to suggest that the payments made to the deceased were anything other than to her as a widow which would have to support her and her child going forward.

I consider that there is no sufficient evidence that this sum was intended for the appellant. It became part of the general assets of Mrs Jackson and, subject to the 1975 Act, she was entitled to use or dispose of it as she choose. I therefore agree with Parker J on this point.

iii) *Lack of expectation of benefit:* Ms Stevens-Hoare submits that the appellant should not be penalised for lack of expectation of benefit from her mother's estate. It would be contrary to public policy if claimants had to prove expectation as this might encourage some undesirable conduct by prospective claimants.

For my part, I do not think that this factor has much weight in this case. The only beneficiaries are the Charities, who can have had no expectation either: the deceased had no connection with the Charities. The appellant, on the other hand, was the only child of the deceased, and she was deprived of any expectation primarily because Mrs Jackson had acted in an unreasonable, capricious and harsh way towards her only child.

iv) *Mrs Jackson's testamentary wishes:* Ms Stevens-Hoare submits that the judge was wrong to pay such high regard to the deceased's testamentary wishes. There was no other beneficiary's needs to which the court had to pay attention. Since the trial judge had found that it was unreasonable to exclude the appellant, there had to be consideration of reasonable provision. Ms Reed submits that DJ Million was correct to have regard

to the deceased's testamentary wishes: see per Oliver J in *Re Coventry dec'd* [1980] Ch 461 ("An Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases.").

In my judgment Parliament has entrusted the courts with the power to ensure, in the case of even an adult child, that reasonable financial provision is made for maintenance only. In my judgment that limitation strikes the balance with the testamentary wishes of the deceased whose estate is used for the purposes of making an award, at least in this case where there is no other claimant apart from the Charities. They have no demonstrated need or expectation.

v) *Estrangement:* Ms Stevens-Hoare relies on DJ Million's findings of fact as to responsibility for this. Ms Reed submits that estrangement is relevant and that it is difficult to apportion blame for estrangement, but relies on the fact that DJ Million did not simply find that Mrs Jackson's failure to make provision was unreasonable, capricious and harsh. He also found that the Ilotts contributed to some of the difficulties in effecting a sustained reconciliation. He held that the fault was not all on the side of Mrs Jackson (judgment, paragraph 63). Ms Reed also relies on Mrs Ilott's lifestyle choices, meaning her decision to marry Mr Ilott who would have very limited means and work in the home rather than take paid employment.

Ms Reed helpfully referred us to *Gold v Curtis* [2005] WTLR 637 (Master Bowman) where a son who was estranged from his deceased mother, who was difficult and combative, until shortly before her death, made a claim opposed by his wealthy sister on the ground that he needed extra resources because he had mental health issues and had a daughter who similarly had mental health issues. The court made an order granting him a measure of financial provision despite the estrangement. His share of the estate remained less than that of his sister. As Ms Stevens-Hoare submits, this case was decided on its facts: it contains no statement of principle that assists in this case.

In my judgment, as Ms Reed accepted, responsibility for estrangement is difficult to quantify. I do not consider that on the facts of this case the estrangement ought to deprive the appellant of an award, or even substantially to diminish it, for three reasons. First, although DJ Million found that she was partially responsible for the failure of the attempts at reconciliation, there is no suggestion that she wanted to be estranged from Mrs Jackson. Second, while she may not have made the choices in life that her mother thought were necessary for her to make a success of her life, she has made a success of her life in other ways through being a mother and homemaker. Third, not only may it be difficult to apportion fault here but there may not have been fault on anyone's part. Estrangement may simply have been the result of Mrs Jackson's inability to make lasting relationships with anyone, of which there is other evidence. There is no finding on that one way or the other.

52. *Resources and needs of the appellant (section 3(1)(a):*: Ms Stevens-Hoare submits that straitened circumstances weigh heavily in the appellant's favour (section 3(1)(a)) . She submits that it would be odd if the result on threshold is different from that on quantum. This court, on the appellant's first appeal, characterised the threshold question as a value judgment and the quantum question as an exercise of discretion stating that "there is plainly an overlap between the value judgment that the provision is unreasonable and the exercise of discretion in making an order." (per Sir Nicholas Wall P at [54]).

Ms Stevens-Hoare further submits that the reasonable standard of living or needs for a particular claimant who was a recipient of state benefits is not to be ascertained simply by reference to their income including benefits. She further submits that the court should assess what the appellant needed for her living expenses. The appellant lived within her means and it would penalise her unfairly if the fact that she did so meant that the court found that she did not need an award.

Ms Reed submits that the court would not be justified in providing a home for the appellant because the money saved would be small. The court has to take into account housing benefit and weigh against the small benefit that she would obtain the costs of maintaining the house which she would acquire.

53. I turn to my conclusions on the appellant's needs and resources, bearing in mind all the section 3 factors. There is no evidence that the appellant has any savings. DJ Million found in 2007 that she had a small earning capacity. I do not attach any great value to earning capacity given that the finding was seven years ago, the appellant has no qualifications or recent working experience apart from helping Mr Ilott with book-keeping and she lives in a relatively remote village. If anything her financial position in that regard must be worse now than it was in 2007.

54. Particulars of the income of Mr and Mrs Ilott were submitted to the court. The appellant and her husband earned £620.16 and £6,521.41 in 2013-4, and £1,378.85 and £6,204.20 in 2014-5. The evidence before DJ Million was that their annual income totalled £4,665. On any basis these are very small incomes. The monthly expenses sheets are also very modest. They show no item for clothing for either parent nor do they show any expenditure on items such as gifts, computers or holidays.

55. I have already set out the extent of the state benefits of Mr Ilott and the appellant: at the date of the hearing before DJ Million, the value of their means-tested tax credits and benefits was £13,204 per year (£8,112 tax credit, plus £5,092 housing and council tax benefit). These were joint benefits but it is not relevant on my approach whether the benefits are divided between them equally or in some other proportion. These figures may have increased since 2007 but I do not consider that that is material to my calculation of the award.

56. The court is entitled to look at future as well as present needs. The appellant is now in her 50s and has no pension.

57. I consider that the appellant's resources, even with state benefits, are at such a basic level that they outweigh the importance that would normally be attached to the fact

that the appellant is an adult child who had been living independently for so many years.

58. The first question which I have to decide is whether the current living standard is sufficient. This is the correct test, and the court's assessment should not be motivated by a desire to provide an improved standard of living as opposed to a desire to meet appropriate living needs. Nor on the other hand is the court bound to limit maintenance to mere subsistence level. In my judgment, the appellant's present income is not reasonable financial provision for her maintenance in the context of this application given the restrictions which, as exemplified by Parker J's findings, she has to impose on her own expenditure and the lack of any provision to meet her future needs, for example when she grows older or if she suffers any ill-health.

59. How in those circumstances should the court set about determining the amount of an award if the effect of an award is to remove the state benefit?

60. In my judgment, what the court has to do is to balance the claims on the estate fairly. There is no doubt that, if the claimant for whom reasonable financial provision needs to be made is elderly or disabled and has extra living costs, consideration would have to be given to meeting those. In my judgment, the same applies to the case where a party has extra financial needs because she relies on state benefits, which must be preserved. Ms Reed submits that the provision of housing would not do this. I disagree. The provision of housing would enable her both to receive a capitalised sum and to keep her tax credits. If those benefits are not preserved then the result is that achieved by DJ Million's order in this case: there is little or no financial provision for maintenance at all.

61. The claim of the appellant has to be balanced against that of the Charities but since they do not rely on any competing need they are not prejudiced by what may be a higher award than the court would otherwise need to make.

62. In my judgment, the right course is to make an award of the sum of £143,000, the cost of acquiring the Property, plus the reasonable expenses of acquiring it. That would remove the need to pay rent though some of that money may be required for meeting the expenses that she will have as owner. As Ms Stevens-Hoare submits, having the Property will enable her to raise capital (by equity release) when she needs further income in the future.

63. In addition, I would add to the award a further sum to provide for a very small additional income to supplement her state benefits without the necessity of an equity release. If my Lords agree, I would provide that she has an option, exercisable by notice in writing to the first and second respondents within two months of the date of this order (or within such longer period as the appellant and first and second respondents may agree) to receive a capital sum not exceeding of £20,000 out of the estate for this purpose. According to the current Duxbury tables in At a Glance for 2015/6, the sum £20,000 would if invested give her £331 net income per year for the rest of her life. This is not a large amount because of the factors which weigh against her claim, particularly the fact that she is an adult child living independently, Mrs Jackson's testamentary wishes and to a small extent the appellant's estrangement from Mrs Jackson.

64. The option may be exercised in part more than once provided that the total sum of £20,000 is not thereby exceeded. I have expressed the provision of a capital sum as an option so that, if the award of a capital sum would result in the loss of benefits, she can if she wishes take a lesser sum, or (as she may prefer to do if she is advised that her benefits will not be prejudiced) she may take the lesser sum and spend it, and then exercise the option for an amount or amounts not exceeding the balance.

65. The court has power to fine tune any order. Thus for example, *Re Debenham* [1986] 1 FLR 404, which was principally relied on by Ms Stevens-Hoare because the claimant was an unwanted arrival, had been taken as a child to South Africa to be brought up by her grandparents and had not been acknowledged by her mother in public even in later life to be her daughter. The claimant met her mother but was estranged from her. At the date of hearing she was in her 50s and her husband had been made redundant. The deceased had only left her £200 in her will. Ewbank J awarded a lump sum of £3000 and an annual sum of £4,500 until they received their old age pension, even though the annual sum would reduce their state benefits. I do not consider however that any fine-tuning precisely on these lines would be appropriate in this case because, as is common ground, it is clearly a case where there should be a lump sum payment and not periodical payments.

H. OVERALL CONCLUSION

66. For the reasons given above, the award made by DJ Million was vitiated by legal errors and must be set aside. I would substitute an award of the sum required for the appellant to purchase the Property where she and her husband currently live plus reasonable expenses of acquisition. I would also award her up to £20,000 in cash to provide her with a small immediate amount of additional income.

67. The answer to the crucial question of law which I posed in the first paragraph of this judgment is, in my judgment, that this is a case where the court can and should make reasonable financial provision out of the deceased's estate for the appellant's maintenance so that her living expenses are relieved without affecting the state benefits on which she relies.

Lord Justice Ryder:

68. I agree. The order of DJ Million must be set aside and I would substitute an order in the terms described by my Lady. I would only add that like my Lady I have not found it necessary to comment further upon how maintenance is to be construed for the purposes of s 1(2) of the 1975 Act. In so far as there is a debate about that, it can await a case in which the circumstances permit of a broader discussion. DJ Million failed to give reasons for his approach to maintenance on the facts of this case and in particular to the limitation of it and the computation that was the consequence. That was a fatal error. There was ample evidence in the form of presentations of income and expenditure that are a commonplace in financial remedy cases and that were adequate for the purpose. As my Lady comments, the appellant's entitlement to benefits was a question of law which could easily have been particularised by the parties at the request of the court had there been any doubt about it.

69. I strongly agree that a person's means are not conclusive of the appropriate level at which that person is entitled to be maintained. That is a value judgment to which the

court must come. As a matter of public policy, the court is not constrained to treat a person's reasonable financial provision as being limited by their existing state benefits nor is the court's function substituted for by any assessment of benefits undertaken by the state.

Sir Colin Rimer

70. I also agree.

ANNEX TO JUDGMENT OF ARDEN LJ: EXTRACT FROM THE JUDGMENT OF DJ MILLION

> 67. In my judgment all of the above factors has produced an unreasonable result in that no provision at all was made for Mrs Ilott in her mother's will in circumstances where Mrs Ilott is in some financial need. However I also accept that Mrs Ilott has not had any expectancy of any provision for herself. Mr and Mrs Ilott have managed their life over many years without any expectancy that Mrs Ilott would receive anything. That does not mean that the result is a reasonable one in the straightened financial circumstances of the family. But is does mean, in my judgment that any provision now must be limited.
>
> **Reasonable Financial Provision**
>
> 68. What financial provision, if any, should be made? All parties are agreed that any provision should be in the form of a capitalised sum. I remind myself that any capitalised sum must be based on an income need.
>
> 69. Mr Harrap submitted that a very modest sum is all that would be justified. He suggested (if any amount were justified) that it should be a small sum to pay for driving lessons and to see her back in work, giving her greater financial independence. He suggested a figure no more than about £3-5,000.
>
> 70. Mr Smith for Mrs Ilott put forward a much more ambitious case. Indeed, so ambitious that at times the total sum sought exceeded the size of the estate. At the end of his final submissions, under pressure from me to quantify his claim, Mr Smith descended to some figures. On behalf of Mrs Ilott he sought:
>
> 1. £186,000 to permit her to purchase their own home (with a discount under right to buy provisions);

2. £53,000 to pay for a single storey extension to the house, to give more living room for the family (including the 4 children who live at home);

3. A capitalised sum equivalent to an income of £10,000 per year for life. (He put no figure on this but the Duxbury tables in At A Glance indicate a sum of £173,000 for a woman ages 46);

4. Some further capital sum to permit the refurbishment and re-equipment of the house after its purchase. According to a list produced during the final hearing such a sum might amount to £40,950 (£27,450 plus £13,500).

71. The claimant also produced a proposed annual budget for the family which totalled £34, 600. Allowing for Mr Ilott's income from his part time earnings at £5, 304 (that is £4,164, plus £900 plus £240), and the current child benefit of £1,570, this would have required an additional annual income of £27, 776. Capitalised for life for a female aged 46 years would require a sum of about £562,000 (using figures from At A Glance). This exceeds the size of the estate.

72. I regret to say that the claimant's case on these matters was presented in an ill thought out and unhelpful way.

73. I must keep in mind that under s 1(2)(b) of the Act the financial provision is for "maintenance" – that is, income based. Mr Smith's justification for the capital sum sufficient to buy the family home was that it would free up income which would be spent otherwise on rent. But, because of the incidence of housing benefit, the net income released would be about £912 per year (£76 per month). This is the net amount or rent paid by the family after housing benefit.

74. Further, I was presented with two figures which showed the net effect (after benefits and tax credits) of providing an income of £10,000 per year. Also, when advancing the proposal for a capitalised sum I was presented with no figures to show the net effect which took into account the state benefits which the family receive. I assume that the practical consequence of a large capital payment would be that the family would lose most, if not all, of their benefits. None of these consequences appeared to have been thought through.

75. I have therefore been left to deal with this case with a more rough and ready approach.

76. I accept that the continuing obligations and responsibilities of Mrs Ilott to her children make it reasonable for her to wish to remain at home for the time being rather than seek work, or at least full time work. This has been her role since the birth of her eldest son, Adam, 23 years ago. In any event, any work she would be likely to obtain would be limited by her lack of employment skills and the travel difficulties stemming from living in a somewhat isolate village.

77. However I would consider it reasonable for her to attempt to support herself by some paid work during the course of the next few years. As I find, even with such future work Mrs Ilott is likely to remain in some financial need. If one or both of Mr and Mrs Ilott work, they may continue to be entitled to working tax credit. Currently tax credits (including child tax credits) make up about £8,112 of the couple's annual income. If I notionally apportion those credits equally between Mr and Mrs Ilott, her proportion of them would be £4, 056 per year. This could be said to be an indicated amount of maintenance which the government accepts as being needed currently to provide Mrs Ilott with a reasonable, but basic, standard of living.

78. On that basis, I find that Mrs Harrap's submission is too low. The reasonable basic needs of Mrs Ilott are greater, as I find, than provision for driving lessons and a small 'starter' sum of capital. I therefore start from my approximated figure of basic needs derived from the tax credit apportionment.

79. From At A Glance 2007-8 Table 20, a Duxbury figure for lifetime maintenance of £10,000 a year net for a woman aged 46 would be £173,000. As a guideline calculation a maintenance figure of £4,000 per year may require about £69,200 (that is 4/10ths of £173,000). This is an approximation, not an arithmetically precise calculation. However, as I have found, Mrs Ilott ought to be able to find some modest part time work in a few years to support herself to some limited extent. I accept that such work would be likely to be poorly paid and that she is likely to continue to require state subsidies for her basic living expenses.

80. However, to reflect that potentially reduced financial dependency, I intend to capitalise the maintenance figure at the lower sum of £50,000. I accept, indeed explicitly state, that such figure has a significant

degree of approximation in it. But, in the absence of any better method of calculation, it is the best I am able to do in the circumstances of this case.

Summary and outcome

81. I consider that Mrs Jackson's will does not make reasonable financial provision for the claimant, Mrs Ilott. I therefore order that the claimant should receive the sum of £50,000 from the estate.