THE ILOTT CASE, MAGNA CARTA, BRUSSELS IV AND THE RIGHTS OF SPOUSES AND HEIRS

Three topical issues concerning succession law and heirship

1. It is topical at this time to concern ourselves with succession issues and the rights of heirs (or heirs of the body as they are sometimes called). Three significant 'stars' in the matters of succession and heirship seemed to have aligned in the legal night sky at this time. They are:

    a. The Supreme Court is deciding what must be the last of a number of appeals in the case of *Ilott v Blue Cross and others* (and in earlier hearings known as *Ilott v Mitson*) which concerns a claim by the sole heir to a portion of her mother's estate, which had been left to charity; the claim was brought under the *Inheritance (Provision for Family and Dependants) Act 1975* ;

    b. Our celebrations of the 800th anniversary of the earliest version of *Magna Carta,* core provisions of which asserted and reinforced the rights of widows and heirs of the body (there were versions in 1215, 1216 and 1217 before the definitive version of 1225[1]); and

    c. The *European Union Regulation No 650/2012* (now better known as *Brussels IV)*, which sets out new rights that can impact the succession of property and the rights of spouses and heirs, came fully into effect on the 17th August 2015.

2. There is a connection between the three 'stars' and they are all part of a historical drama of families and the family inheritance.

Succession rights for spouses and heirs in different jurisdictions

3. Most jurisdictions and in particular those of continental Europe provide non-discretionary rights of succession for spouses and heirs. Usefully, the differing rights in Member States of heirs to inherit are set out on the European Union website. And

[1] http://www.bl.uk/collection-items/magna-carta-1225# For a history of Magna Carta up to it appearance on the Stature Rolls in 1297, see: http://www.bl.uk/magna-carta/articles/consequences-of-magna-carta

if you have a spare moment or two you can find and read the English version of this summary at https://e-justice.europa.eu/content_succession-166-en.do

4. To address issues arising from the increased movement of its citizens across its Member States[2] the European Union boldly sought to simplify the operation of the different succession rules between the jurisdictions of Member States as is explained at http://ec.europa.eu/justice/civil/family-matters/successions/index_en.htm The outcome of this was the last of the three 'stars' mentioned earlier, Brussels IV (European Union Regulation No 650/2012). It is now in full effect in those Member States which have signed up to it. It can be found in its English version at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0107:0134:EN:PDF (For those in a hurry, its basic terms can be read in the leaflet http://ec.europa.eu/justice/civil/files/dgjust_succession_leaflet_en.pdf.)

The English way of handling succession rights of heirs and spouses

5. It is said frequently in legal circles that the primary rule in English law is the freedom of testamentary disposition. This primary rule is only overridden in limited circumstances and in particular in cases brought by an application to the court to decide if and the extent to which the deceased's estate does not make reasonable financial provision for the applicant. The ability for a spouse[3] or heir (or other persons falling within a defined class) to make an application claim is a statutory right which is currently stated in the *Inheritance (Provision for Family and Dependants) Act 1975* as amended[4]. We will refer to it as the 1975 Act.
6. The recognised approach to this piece of legislation was succinctly stated in 1978 by a Chancery Division judge:

[2] For recent migration statistics affecting the UK, see the House of Commons Briefing Paper dated 2 December 2016: researchbriefings.files.parliament.**uk**/documents/SN06077/SN06077.pdf

[3] Of course, under English law current references to 'spouses' now apply the wider statutory meaning and extensions to others

[4] http://www.legislation.gov.uk/ukpga/1975/63

> "It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. Subject to the court's powers under the 1975 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.
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> "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."[5]

7. Hence, the laws of England and Wales still give great prominence to the finality of a valid testamentary document that is governed by those laws. It is that approach that explains the position adopted by Mr Justice Oliver, whose judgment still remains good law and of considerable importance with the general approach to the 1975 Act.

Brussels IV and the clash with English law

8. As is said earlier, the approach of English law is not the approach adopted in the rest of Europe or, indeed, in most places in the world. The difference in this approach came to the fore with the decision by the UK government not to implement Brussels IV which now applies to 25 Member States.
9. The general rules of that Regulation are set out in Articles 21 and 22:

    21.1 Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.

    21.2 Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely

[5] Oliver J, *Re Coventry (deceased)* [1979] 2 All ER 408; confirmed by Court of Appeal [1979] 3 All ER 815

connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.

22.1 A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.

10. One can see that if these provisions were apply in the United Kingdom, inheritance rights to English assets could be governed more than now by the laws of succession of another country.

11. The traditional clash between English law's approach to inheritance rights and those that apply in the bulk of other European Union countries was further highlighted when parts of the Law Commission's draft Bill, which later became the *Inheritance and Trustees' Powers Act 2014*, were rejected by Parliament. Those proposed changes would for the first time have allowed a 1975 Act claim to be brought against the English and Welsh assets of the deceased, even if he/she had died domiciled outside the England and Wales. So, for example, in the case of a Polish person who dies having been habitually resident in England, while retaining Poland as his/her domicile of origin, the law remains that there is no entitlement for the surviving spouse/civil partner or child (or others asserting some form of dependency) to pursue in England any claim under the 1975 Act against the deceased's assets.[6]

12. So there is a discord between (a) the prevailing provision for spouses and heirs in most jurisdictions in the world and (b) those jurisdictions that follow English law and allow the rule of testamentary freedom to override the rights of spouses and heirs save in limited circumstances. Unsurprisingly, given this discord between the underlying laws in England and Wales and the rules of succession of the other signatory states, the United Kingdom Government did not become a signatory to Brussels IV.

[6] This would principally concern the immovable assets based in this country, as in general questions relating to succession to movables are governed by the law of the deceased's domicile.

The historical development of succession rights under English law since Magna Carta

13. English law's approach to inheritance rights appears to have crystallised in the 1830s. The Inheritance Act 1833 codified some succession rights, including cases of intestacy. Also, in 1833 the Dower Act of that year allowed a husband the right to extinguish his widow's dower by deed or by will. Dower was an ancient entitlement of the surviving wife to a protected interest in her husband's estate following his death. By way of example the Magna Carta states (in translation):

> "A widow after the death of her husband shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance which her husband and she held on the day of the death of that husband; and she may remain in the house of her husband for 40 days after his death, within which time her dower shall be assigned to her" (later classified as clause 7)

14. Elsewhere in that famous charter it also recognised the importance of protecting the rights of widows and heirs in several of its other provisions: it sought to address grievances over wardship arrangements for under age heirs: for example (clause 3) "…let him [the heir] have his inheritance without relief and without fine when he comes of age." After King John's death and the variations during the reign of Henry III in 1297 Magna Carta[7] appeared on the Statute Roll and for centuries thereafter that version, based on the 1225 charter, formed the recognised statutory basis for its provisions. However, over time they were, all bar a few, repealed. Further, over time the courts gradually removed ancient fixed heirship rights for the deceased's widow and legitimate children (now more commonly known as "forced heirship", by reason of their retention in many other countries). This culminated in the Wills Act 1837, which succinctly codified what is, subject to some later changes to that statute, the legal position today.

15. However, if it is thought that a laissez faire or liberating approach were an answer to ancient and out of date previous practices, then it should be borne in mind that at the time the vast bulk of land in the country was in the ownership of a few landed

[7] During the reign of Edward I: http://www.legislation.gov.uk/aep/Edw1cc1929/25/9

families and subject to strict settlements or legal structures which curtailed any ability to pass on the land on death; also, by the 19th century married women had virtually no rights with regard to possessions: ownership of personal possessions (which then including leases) passed to their husbands on marriage; with regard to freehold property, they retained its ownership, but not the right to the receipt of rent. They did not benefit from any of the voting reforms of the 19th century and it was only in 1870 that the first Married Women's Property Act began a gradual series of reforms to strengthen their entitlements[8].

16. The thinking behind the 1975 Act appears to have come from other Commonwealth countries, which had brought in reforms to address the clear problems arising from the predominance of wills made in those countries, which of course adopted or applied English laws. The first reforming statute was the *Inheritance (Family Provision) Act 1938*: it followed a New Zealand approach and gave the probate judge discretion to alter the deceased's will if "reasonable provision" had not been made for the maintenance of the widow or legitimate children. The Act was not particularly well received. For example, Mr Justice Farwell[9], after rejecting an application by a widow, whom the deceased husband had left to live with another woman and the two illegitimate children that they had together, stated:

> "The jurisdiction under this Act is one which is extremely difficult for the court to administer. The judge is put in a most unhappy position in cases of this kind. However, it is a discretion, and it is a discretion which the court must exercise judicially …"

17. He dismissed the widow's application and also made a costs award against her. This was even though the deceased had made no capital provision for her when they separated and was paying her £1 a week[10], which ended on his death.

18. Of course, for the surviving spouse the legal position and general approach of the courts have substantially improved[11]. A reported case that illustrates this is *Baker v*

[8] With the severe difficulties over securing a divorce and even greater problems obtaining financial provision thereafter, it is little wonder that there arose the suffragette movement, and a surprise that it took so long for it to come on to the scene.

[9] *Re Joslin, Joslin v Murch* [1941] 1 All ER 302

[10] About £50 at current prices

Baker[12] ; while recognising there is limited authority on what is reasonable financial provision for the spouse of the deceased and the equally guidance in divorce cases is not a starting point or reliable approach, the special position has to be taken into account; so in that case the widow was awarded assets from the estate that amounted to a figure of £750,000 that amounted to more than half its overall value.

The Ilott case

19. The same cannot be said for the heirs. For years the approach was to require an adult child of the deceased to prove special circumstances or a moral claim. That is no longer the case, but the recent reported decisions still emphasise the difficulties in fairly assessing what should be awarded.

20. The Ilott case is now before the Supreme Court[13]. At the time of writing this article seven of its judges are hearing a further and hopefully final appeal in a case which began its days as the case of *Ilott v Mitson*[14]*.* The case concerns a claim by the only daughter for provision from her mother's estate. It has gone through to a number of hearings and appeals, this latest being by the charity beneficiaries. Out of an estate worth £486,000 and all left to named charities, the Court of Appeal more recently awarded £143,000 to enable the daughter to purchase her housing association home, the costs of the purchase and up to £20,000 structured in a way so as not to diminish her state benefits. Previously the daughter had been awarded £50,000. (The charities had appealed against the earlier award made in a lower court, initially succeeding, only to lose before the Court of Appeal; the daughter's appeal against the amount was heard at a subsequent hearing, where she lost and against which she appealed to succeed again in the Court of Appeal[15]. And all this for a modestly sized estate.)

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[11] Provided the deceased was at death domiciled in England and Wales

[12] [2008] EWHC 977 (Ch)

[13] https://www.supremecourt.uk/cases/uksc-2015-0203.html

[14] [2011] EWCA Civ 346 and [2015] EWCA Civ 797

[15] http://www.bailii.org/ew/cases/EWCA/Civ/2015/797.html.

21. We now await the decision of the Supreme Court and for the guidance it will give in what heirs can expect to be awarded by a court when they are given no provision or less than they had hoped for under the deceased's estate.

The resolution of claims

22. The discretionary nature of the rights of heirs under our legal system can throw heirs into the realm of the courts. Such is the structure of the dispute process, coupled with the high expense of going to the courts, the vast bulk of adult children's claims under the 1975 Act are not pursued are settled well ahead of any hearing[16]. The advice to such claimants is, by and large, not expect much and to defendants is to settle on a nuisance factor basis only and thus avoid the costs and delays of a dispute. With pre-action protocols and mediation as a standard preliminary to any court proceedings (and such litigation to be a last resort) many of these issues – often between the widow of a later marriage and the deceased children from an earlier relationship - are thrashed out in confidential negotiations. Such mediation at least allows the parties' sense of injustice and family wrangles to be aired but – hopefully – resolved by some form of compromise – perhaps not a dissimilar process to that which took place at Runnymede[17].
23. But while heirs, as that word was understood in 1215, can complain at the lack of a modern 'charter' to recognise the extent of their former ancient entitlements, under more recent legislation that term has in effect been greatly widened to include children born outside of a marriage; and, for claims on estate under the 1975 Act for death since 1 October 2014, the term family has been extended beyond the traditional marriage to allow children to claim as within a family even if it only consists of one person.
24. Some factors which seem to be coming more into play at this time are the considerable legal costs of claims under the 1975 Act, the increasing number of

[16] In certain circumstances legal aid can be available.

[17] It is understood, the principal mediator was the Archbishop of Canterbury. For a brief, helpful account, see: http://www.bl.uk/magna-carta/articles/magna-carta-people-and-society

family breakdowns, the disappointment of children of earlier relationships and the difficulty imposed on advisers (some of whom are well out of their depth) in drafting wills to accommodate the conflicts within families. Some will argue the English legal system is not adjusting enough to make allowances for these factors. Despite the current move to stand aside from the European Union, some will argue it is appropriate to observe other jurisdictions which allow prescribed rights of inheritance to find out if they have something relevant for the English legal system now.

25. Nevertheless, pending the outcome of this much litigated Ilott case, the extent of the rights of such heirs, nearly 80 years after the Act of 1938[18], are still unclear. Hopefully, we will soon know to what extent the Supreme Court will accommodate claims by adult heirs under the legal system of England and Wales and that decision will be part of an ongoing historical drama concerning families and the family inheritance. Whatever the outcome, it is clear that since ancient times (as witnessed by Magna Carta) the rights of the deceased's family have played an important part of English law and their entitlements and claims have required constant consideration by both Parliament and the courts.

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[18] Inheritance (Family Provision) Act 1938