Studia Prawnicze. Rozprawy i Materiały 2016, nr 1 (18) • Studies in Law: Research Papers 2016, No. 1 (18)
ISSN 1689-8052 • e-ISSN 2451-0807

**Mariusz Załucki**
Professor, Andrzej Frycz Modrzewski Krakow University

# Protection of Family Against Testamentary Dispositions in English Law. Recent Case of Ilott v. Mitson: On the Road to a Regime of Forced Heirship?

## *Protection of family members mortis causa*

An impact of inheritance law standards on personal relations between people is unquestionable. A function to protect the family of the deceased is usually referred to as one of the most important functions of the inheritance law in the non-financial sphere. In this way, due appreciation is given, on the one hand, to the role of family relations affecting certain behaviour of the future decedent, and on the other hand, to the need for proper adjustment of the proprietary situation created as a result of his/her death to the personal relations linking him/her with family members[1]. In fact, the decedent has generally some specific legal and family relations with other persons and for this reason, he/she may have certain responsibilities, especially to his/her closest relatives and spouse[2].

Interest protection of such persons and their resulting rights is treated by some lawyers as a natural thing. During the lifetime of the decedent, institutions of the family law (e.g., maintenance)[3] execute such protection. However, after the death, specific functions in this area can be fulfilled by the inheritance law[4]. Therefore, in various jurisdictions, in the interests of the persons closest to the deceased, freedom of testamentary dispositions is limited, granting them effective *mortis causa* rights, independent of the will of the

1 J. Biernat, *Ochrona osób bliskich spadkodawcy w prawie spadkowym*, Toruń 2002, p. 11.

2 M. Załucki, *Uniform European Inheritance Law. Myth, Dream or Reality of the Future*, Kraków 2015, p. 106.

3 J. Gwiazdomorski, *Przesłanki istnienia obowiązku alimentacyjnego*, Warszawa 1974, pp. 5 et seq.

4 F. Bydlinski, *System und Prinzipien des Privatrechts*, Wien–New York 1996, pp. 402–413.

testator. Observing the evolution of legislation in this field shows the number of institutions which, in various legal systems have been designed to achieve this goal. Currently, this is generally done through a system of the so-called inheritance reserve (the mandatory part), while in other cases through the system of the legitim. However, in many countries, common law confers on the courts the power to correct testamentary dispositions and matching them to the circumstances of the case. This is the system of the so-called discretionary adjustive power of the judge, having a quasi-maintenance character[5].

## *English law*

An example of an application of this type of solution is, e.g., the English law, which, under the provisions of the *Inheritance (Provision for Family and Dependents) Act 1975* provides, based on the discretionary power of the judge, a possibility of interference of the court in the fate of the inheritance estate after the death of the testator[6]. The entitled person may demand here that the probate court interferes with the last will of the testator or – which should be stressed – an appointment to the inheritance resulting from the statute. It is a claim for the so-called *family provisions*[7].

The essence of the statutory right lies in the fact that in case of the testator's death a given person survives the deceased and belongs to the circle of his/her closest persons, he/she may request the court to issue its ruling serving his/her financial provision with the deceased's estate, if the testator has made a disposition of his/her property by will or when intestacy occurs, or combination of both, the will and the law, and the effect of the inheritance does not provide the proper provision for that person (Article 1 par 1 of the Act)[8]. The decisive factor – beyond being in the circle of the closest persons – is, therefore, the fact of not receiving the proper provision[9].

This premise depends on the circumstances of the case and requires a test (check) whether a person, due to the testator's death and adverse to his/her

---

5 Cf. M. Załucki, *Uniform European Inheritance Law*…, pp. 106 et seq. and the literature mentioned there.

6 This piece of this article concerning English family protection system against testamentary dispositions is a fragment of a book I presented previously (Cf. M. Załucki, *Uniform European Inheritance*…, pp. 120–123).

7 I. Johnson, *Conditions not to Dispute Wills and the Inheritance (Provisions for Family and Dependandts) Act 1975*, Liverpool Law Review 2004, No. 25, pp. 71–77.

8 Cf. R. Frimston, *Inheritance (Provision for Family and Dependants) Act 1975, the EU Succession Regulation and the Inheritance and Trustees' Powers Bill*, Private Client Business 2013, pp. 192 et seq.

9 G. Miller, *Developments in Family Provision on Death*, Family Law Week of 11 March 2007, p. 1.

testamentary dispositions or the statutory inheritance construction, has lost the possibility of existence, as well as how much his/her life level deteriorated following the death of a close relative. The law in this area introduces two standards: the standard of the surviving spouse and the standard of maintenance[10]. The first one is of course related to the role played by his/her spouse in the life of the testator and it means such a provision, which a husband or wife should receive, and which would be reasonable taking into account all the circumstances of the case, regardless of whether such a provision is necessary or not to maintain the entitled. The second standard concerns all other entitled persons and means such a financial provision as it would be reasonable taking into account all the circumstances of the case, and which is necessary for the maintenance of the applicant (Article 1 par 2 of the Act)[11]. The spouse is entitled, therefore, the right to adequate provision, and the remaining ones to a provision reasonably required for their maintenance[12].

In determining whether the entitled persons are duly provided, the Court must take into account a number of circumstances. Great importance is attributed to the nature of the bond between the deceased and a given person, the level of family life, the attitude of the entitled, or an impact of a settlement on the rights of others. It should be considered whether the effects of the disposition of property upon death or statutory rules are reasonable and fair in this case[13]. The Act indicates here that if the court is satisfied that the person entitled has not received an adequate provision, with the decision to intervene in the inheritance and the succession process it should keep in mind the following general conditions for the use of the discretionary power: the resources and the financial needs of the applicants and the beneficiaries of the estate, both present, and future; the responsibilities which the deceased had in relation to the applicants and the beneficiaries; the size and the nature of the inheritance estate; any physical and mental disability of the applicants and the beneficiaries; all other issues, including the conduct of the applicant or other persons, which in the circumstances of the case the court may consider relevant (Article 3 par 1 of the Act).

For certain categories of the entitled persons, some additional premises have been provided. For example, if a claim for family provisions is brought by the spouse, in addition to the above premises – in accordance with the

---

10 R. Kerridge, *The Law of Succession*, London 2002, p. 159.

11 H. Hiram, *New Developments in UK Succession Law*, Electronic Journal of Comparative Law, 2006, No. 12, p. 9.

12 *Ibidem*.

13 S. Ross, *Capitalisation of Income Needs in Inheritance Act Claims: Duxbury Or Ogden?*, Family Law Week of 12 March 2009, p. 2.

applicable provisions of the art. 3 par 2 of the Act – the court should also take into account the age of the applicant and the duration of the marriage with the deceased. In this context, it is also important whether the applicant has contributed to the family property, even by looking after the home or caring for the family[14]. Assessment is also made to the type of marital relations linking the applicant and the deceased[15]. However, if the claim for family provisions is made by the deceased's child, in addition to the general prerequisites, the court must take into account the child's attitude and the ability to get education (Article 3 par 3 of the Act). When the applicant under the Act is a person who immediately before the death of the deceased was maintained, wholly or partly, by the deceased, the court, in addition to the general premises, must consider the motives for the deceased to have believed to be responsible for maintenance of such a person, as well as the length of this responsibility discharge (Article 3 par 4 of the Act).

The court considering a case has a very wide range of possible decisions to make, in the exercise of its discretional power. The court may decide: 1) to grant out of the deceased's estate certain periodical payments for the term specified in the order; 2) to make payment of a lump sum of money; 3) to transfer ownership of certain assets comprising the estate; 4) to award appropriate specific benefits out of the assets comprising the estate; 5) to make changes in the ownership of another kind in the assets of the estate, to encumber certain assets of the estate or to establish a trust; 6) to make a change in the pre-marital or post-marital settlements in which one party was the deceased, and this change may be for the benefit of the other spouse, each child of the marriage, or a person who was treated by the deceased as a child of the family (a stepchild) in relation to the marriage.

The probate court may therefore change the last will of the deceased made in case of death by will or interfere with the statutory rules of succession. This can be done in such a way that in the opinion of the court is just and appropriate in the circumstances of the case. Taking into account the legitimate interests of the entitled the court should take into account the rights of others, including others bringing claims for family provisions and the beneficiaries of the deceased's estate entitled to inherit under the title of inheritance, which is to be changed. It should be also noted that the claim for family provisions is strictly personal. Therefore, its alienation is not possible, as well as the claim

---

[14] P. Reed, *Inheritance Act Claims After White & Miller*, Family Law Week of 22 January 2007, p. 1.

[15] See also A. Chandler, *What is the Measure of Maintenance? How Does the Court Quantify Spousal Periodical Payments?*, Family Law Week of 16 March 2009, p. 1.

is not subject to inheritance. It can therefore be examined by the court only if the applicant of this claim is alive.

The idea of this type of legal constructions is based on the assumption that each case of claims made against the will of the testator, and therefore contesting the will should be tested individually, relying not only on formal ties linking the deceased with a given person, but also on other grounds, especially on the social situation of the entitled. This solution allows for equitable balancing of interests worthy of legal protection: the will of the deceased and the living conditions of the people omitted by the testator in his/her disposition. In an extreme situation, it could happen that the interference of the court would be here more severe for the will of a testator than in the systems of the reserve or the legitim. However, because this intervention would be dictated by other important values, one cannot deny its correctness.

## *Practical application*

The number of reported claims brought under the *Inheritance (Provision for Family and Dependants) Act 1975* are relatively few and far between as the nature of such claims means that most cases are settled out of court, away from the public eye[16]. The limited reported case law means that 1975 Act claims are uncertain to predict, particularly so when those making the claim are independent adult children[17]. It might be one of the reasons why the recent case of *Ilott v. Mitson*[18] has caused a stir in the world of inheritance act claims in England[19]. The judgement has attracted a great deal of media attention and has helpfully provided an overview of the issues which the court must consider and some comment upon the effect of an award under the 1975 Act may have on those applicants who are in receipt of state benefits (and the effect of any award may have on those benefits)[20].

The case deals with a claim by Heather Ilott over the estate of her deceased mother, Melita Jackson. The deceased left the majority of her net es-

---

16 R. Piper, *Ilott v. Mason: A Challenge to Testamentary Freedom?*, Charles Russel Speechlys Website, 4 August 2015, http://www.charlesrussellspeechlys.com/insights/latest-insights/litigation-dispute-resolution-new/ilott-v-mitson-a-challenge-to-testamentary-freedom (5.05.2016).

17 *Ibidem*.

18 [2015] EWCA Civ 797.

19 Cf., for example, H. Mason, P. Fudakowska, *Striking a fair balance*, New Law Journal 2014/7615, p. 13; J. Ward, *Winning the battle of wills*, New Law Journal 2015/7674, p. 27; S. Evans, *Mountain or molehill?*, New Law Journal 2016/7686, p. 13; B. Sloan, *The "Disinherited" Daughter and the Disapproving Mother*, Cambridge Law Journal 2016/75, p. 31.

20 Cf. R. Piper, *Ilott v. Mason…*

tate (£486,000) to three animal charities (she 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) and made no provision for Heather Ilott – her only daughter. Heather Ilott contested the will under the *Inheritance (Provision for Family and Dependants) Act 1975*. She was, by this time, a married mother of five, in dire financial straits and almost completely reliant on state benefits. She had been estranged from her mother for almost 30 years after eloping with a boyfriend at age 17[21]. She knew that the deceased intended not to leave her any of her estate in her will[22].

## *Ilott v. Mitson*

The case was first decided on 7 August 2007 when the court made an award of £50,000 in favour of the appellant, the adult daughter of the deceased (about 10 % of the estate). The court found that the deceased 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. Heather Ilott appealed this decision, on the basis that the award was inadequate. She maintained that she should receive a greater award than 10% of the estate. The decision was subsequently overturned and a finding in favour of the three charities[23]. Heather Ilott then appealed again and the Court of Appeal ruled in her favour but remitted the case to determine the issue of quantum. The recent judgment (dated 27 July 2015) confirms that Heather Ilott has been awarded a third of her mother's estate, some £164,000[24].

As it was presented in the doctrine, "the Court of Appeal decided that the District Judge had made two fundamental errors which meant that the primal award for £50,000 should be set aside". According to this opinion, firstly, "the District Judge had not explained how he had limited the award to reflect Heather Ilott's ability to live within her means and her lack of expectation to benefit under her mother's estate. The Court of Appeal stated

[21] Cf. R. Harling, T. Edgar, *Ilott v Mitson and the danger of Inheritance Act claims*, Family Law, 3 August 2015, http://www.familylaw.co.uk/news_and_comment/ilot-v-mitson-and-the-danger-of-inheritance-act-claims (5.05.2016).

[22] Cf. *Reasons for Judgement of the Court of Appeal (Civil Division) on Appeal From the High Court Family Division Between Ilott and Mitson*, [2015] EWCA Civ 797.

[23] [2014] EWHC 542 (Fam), [2015] 1 FLR 291.

[24] [2015] EWCA Civ 797.

that Heather Ilott should have been provided with reasons to allow her to consider whether these reductions were excessive". "Secondly, the District Judge had been required to calculate the amount that should be provided for Heather Ilott's maintenance under the estate. In making this calculation the District Judge had not known the effect that the award of £50,000 would have on her state benefits". The Court concluded that Heather Ilott's "straitened financial circumstances were not conclusive as to the appropriate level at which she was entitled to be maintained". The Court further determined that Heather Ilott's "estrangement from her mother ought not to deprive her of an award under the estate (or to substantially diminish it) because it was difficult to apportion fault". On weighing up the factors listed above, the Court of Appeal decided that Heather Ilott's "resources, even with state benefits, were at such a basic level that they outweighed the importance that would normally be attached to the fact that she was an adult child who had been living independently from her mother for years". As such, the Court of Appeal made an increased award of £143,000, to enable Heather Ilott to purchase her housing association house, in addition to the reasonable expenses of acquiring the property. She was also awarded the option to take a further maximum capital sum of £20,000, "to provide an immediate payment from which her further income needs could be met". The Court considered that, "as a matter of public policy, they were not constrained to treat a person's reasonable financial provision as being limited by or to their existing state benefits". The Court decided it could and should make reasonable financial provision for Heather Ilott out of her mother's estate for her maintenance so "that her living expenses were relieved without affecting the state benefits on which she relied"[25].

## *Criteria for claims*

According to the above, it has to be mentioned, that the court in *Ilott v. Mitson* judgement said that in determining the amount of an award, the court is required to have regard to the factors listed in section 3(1) of the *Inheritance (Provision for Family and Dependants) Act 1975*. It has considered many factors, explaining their significance on the basis of the case, *inter alia*:

– *resources and needs of the beneficiaries:* first of all the court said that the charities do not make any case that they have resources and needs to be taken into account. For the charities, any money from this estate is a windfall[26].

[25] Cf. R. Piper, *Ilott v. Mason*…

[26] Cf. *Reasons for Judgement*…, p. 14.

- *the deceased obligations and responsibilities to the appellant:* the court said that the appellant is an adult child living independently is the factor that 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[27].
- *lack of expectation of benefit:* It was also considered whether the appellant should be penalised for lack of expectation of benefit from her mother's estate. According to the court, this factor has not 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 the deceased had acted in an unreasonable, capricious and harsh way towards her only child[28].
- *testamentary wishes:* that court analyzed whether is should pay high regard to the deceased's testamentary wishes. The court explained that 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. That limitation strikes the balance with the testamentary wishes of the deceased whose estate is used for the purposes of making an award[29].
- *estrangement*: the court also considered the responsibility for estrangement and decided that it is difficult to quantify. The court said that on the facts of this case the estrangement ought not to deprive the appellant of an award, or even substantially not to diminish it, for three reasons. First, there was no suggestion that the appellant wanted to be estranged from her mother. 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 the deceased inability to make lasting relationships with anyone, of which there was other evidence[30].
- *resources and needs of the appellant*: according to the court, 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

[27] *Ibidem*.
[28] *Ibidem*, p. 15.
[29] *Ibidem*, p. 16.
[30] *Ibidem*.

income including benefits. The court should assess what the appellant needed for her living expenses. The court did not attach any great value to the earning capacity of the appellant. However the court had analyzed her financial position and established that her annual income was very small. Also the court had analyzed the monthly expenses sheets of her family and established that they show no item for clothing for either parent nor do they show any expenditure on items such as gifts, computers or holidays. The court also said that is entitled to look at future as well as present needs. The appellant was in her 50s and has no pension. Her resources, even with state benefits, were 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. In this circumstances the court said that the question to decide is whether the current living standard of the appellant is sufficient. This is supposed to be a 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. According to this, the court has established that the appellant's income was not reasonable financial provision for her maintenance. Then it had to decide 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. According to the court, 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 this judgement, the same applies to the case where a party has extra financial needs because she relies on state benefits, which must be preserved. The court said that 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[31].

## *The judgement*

In the judgment, according to the court, the right course was to make an award of the sum of £143,000 (the cost of acquiring the property) plus the reasonable expenses of acquiring it. According to the court, that would remove the need to pay rent though some of that money may be required for

[31] *Ibidem*, pp. 17–18.

meeting the expenses that the deceased daughter will have as owner. In this opinion, having the property will enable her to raise capital (by equity release) when she needs further income in the future[32].

This decision was very often commented. It even caused some alarm to charities reliant on legacy funding and to potential donors. Some also feared that the judgment could be construed as opening a channel for adult children to claim an automatic share of their parent's estate. It seems like the English doctrine thinks that the decision introduces an element of uncertainty when considering potential claims by adult children under the 1975 Act. What is notable about the decision is the importance it places on the needs of family over and above non related beneficiaries, in this case, charities. In this respect the court was also dismissive of the charities' needs and resources when considering the amount of award to make. No needs and resources were submitted on behalf of the charities and the court therefore decided that anything the charities inherited from the estate would amount to a windfall on their behalf. Therefore the fact that the charities received something from the estate albeit not what the deceased originally intended, appeared fair in the court's view[33].

It may be assumed that the judgement will present further concerns for testators and beneficiaries alike as this case seems to suggest that even in the most strained relationships where testators have a clear and stated desire to exclude a child from benefitting from their estate, should that child be in dire financial circumstances at the date of that parent's death they appear likely to be able to bring a successful claim against the estate for financial provision[34]. This arguably is limiting the principle of the freedom of testamentary disposition and taking English closer to a regime of forced heirship, albeit one that appears to only benefit those who can demonstrate a financial need. As some say, the judgement might be construed as an attack on the core principle of testamentary freedom, particularly if it limits the extent to which testamentary intentions should be specifically evaluated against reasonable financial provision[35]. If this interpretation is correct, the principle of freedom of testamentary disposition may be limited and the 1975 Act would bring England closer to the forced heirship rules of many European countries. That is why many commentators in England feel that this is a significant challenge

---

[32] *Ibidem*, pp. 18 et seq.

[33] Cf. T. McInnes, *Ilott -v- Mitson: how will it affect future claims on Wills?*, Halsbury's Law Exchange, 3 August 2015, http://www.halsburyslawexchange.co.uk/ilott-v-mitson-how-will-it-affect-future-claims-on-wills (5.05.2016).

[34] As indicated by R. Piper, *Ilott v. Mason*…

[35] B. Sloan, *The "Disinherited" Daughter*…, p. 33.

to a person's freedom to dispose of their estate[36]. And even if the judgement doesn't mean that all adult children claims will be successful, it does appear to suggest that when met with a claim from an impoverished applicant related to the deceased and weighed against non-related charities on the other side, then the court is likely to err on the side of the family member. Especially where the estate is large enough to encompass such an award[37]. As it may be assumed, it raises a lot of further questions concerning not only the protection of family members but also a freedom do dispose property upon death and disinheritance. It seems like English law may be close to the departure from a long-standing tradition. The further case-law needs to be observed. Perhaps this judgement may be read as an impulse to approach to the continental legislation. It may be one of the first steps on the road to inheritance law uniformization in Europe.

Considering the above, it has to be mentioned that the problem of the *Inheritance (Provision for Family and Dependents) Act 1975* interpretation under English law is not over. It was confirmed in March 2016 that the UK Supreme Court, the final court of appeal in the UK for civil cases, has granted (on the 22 February 2016) permission to appeal in the case of *Ilott* v. *Mitson* (for the charities)[38]. This case will be the first time a case under the 1975 Act will be heard by the UK Supreme Court (or its predecessor the House of Lords). The Supreme Court is likely to hear the case in early 2017 and – what is justified – the outcome is expected to generate significant interest. Will it be important for continental Europe – the time will tell.

**Abstract**
**Protection of Family Against Testamentary Dispositions in English Law. Recent Case of Ilott v. Mitson: On the Road to a Regime of Forced Heirship?**

The English *Inheritance (Provision for Family and Dependents) Act 1975* is one of the legislative solutions that provides, based on the discretionary power of the judge, a possibility of interference of the court in the fate of the inheritance estate after the death of

[36] Cf. V. Ellis, *The Practical impact of the decision in Ilott v Mitson & Others [2015] EWCA Civ 797*, Law Skills IPFD, 18 August 2015, http://www.lawskills.co.uk/articles/2015/08/he-practical-impact-of-the-decision-in-ilott-v-mitson (5.05.2016).

[37] N. Neville, *Implications of Ilott v Mitson for testators and beneficiaries*, 30 July 2015, http://www.shoosmiths.co.uk/client-resources/legal-updates/implications-ilott-v-mitson-testators-and-beneficiaries-10209.aspx (5.05.2016).

[38] Cf. UK Supreme Court, *Press Release: Ilott (Respondent) v The Blue Cross and others (Appellants)*, UKSC 2015/0203, 1 March 2016, https://www.supremecourt.uk/news/permission-to-appeal-decision-01-march-2016.html (5.05.2016).

the testator. Recently, the English court has decided a case on the grounds of this Act. The judgement is controversial and bring England closer to the forced heirship rules of many European countries. The article discusses this judgement.
**Key words:** family provision, protection of people close to the deceased, protection against testamentary dispositions, forced share

## Streszczenie
## „Ochrona rodziny przed rozrządzeniami testamentowymi w prawie angielskim. Orzeczenie w sprawie *Ilott v. Mitson*: na drodze do systemu obowiązkowej części spadku?"

Angielskie prawo spadkowe należy do rozwiązań legislacyjnych, które przewidują rozwiązania oparte na dyskrecjonalnej władzy sędziego, pozwalające na ingerencję w ostatnią wolę spadkodawcy, po jego śmierci. Ostatnio angielski sąd rozpoznał – na gruncie obowiązujących w tej mierze przepisów – sprawę, której kontrowersyjne rozstrzygnięcie może pozwolić na zerwanie w Anglii z wieloletnią tradycją i zbliżenie tamtejszego systemu do tych systemów, które przewidują obowiązkową część spadku. Artykuł omawia to orzeczenie.
**Słowa kluczowe**: ochrona rodziny, ochrona osób bliskich spadkodawcy, ochrona przed rozrządzeniami testamentowymi, obowiązkowa część spadku