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**Testamentary freedom:
how far can you push the
court over a testator's
intentions in 1975 Act
claims?**

Mark Baxter, 5 Stone Buildings

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Is testamentary freedom compatible with the 1975 Act?

- **No:** HHJ Paul Matthews in *Legg v Burton* [2017] 4 WLR 186
- **Yes?:** Lord Hughes in *Ilott v The Blue Cross* [2018] AC 545

***Legg v Burton* [2017] 4 WLR 186 at [64] per HHJ Paul Matthews**

"complete freedom of testation in England only existed between 1891, or (if we ignore limits on gifts to charity) 1833 (for men) or 1883 (for women), and 1938... there are not just family and societal pressures on what you may do with your estate, but also legal ones, in the form of the Inheritance (Provision for Family and Dependants) Act 1975"

***Ilott v The Blue Cross* [2018] AC 545 at [1] per Lord Hughes**

"Unlike some other systems, English law recognises the freedom of individuals to dispose of their assets by will after death in whatever manner they wish...To this general rule, the statutory system of family provision imposes a qualification..."

***Ilott v The Blue Cross* [2018] AC 545 at [13] per Lord Hughes**

"The limitation to maintenance provision represents a deliberate legislative choice and is important... That demonstrates the significance attached by English law to testamentary freedom."

Ilott v The Blue Cross [2018] AC 545 at [47] per Lord Hughes

"It is not the case that once there is a qualified claimant and a demonstrated need for maintenance, the testator's wishes cease to be of any weight. They may of course be overridden, but they are part of the circumstances of the case and fall to be assessed in the round together with all other relevant factors."

What weight have judges put on testamentary freedom since?

- Given as reason for refusing or limiting awards?
- Departure justified when awards are made?

Award refused or reduced

Ball v Ball, 2nd August 2017 (HHJ Matthews) (adult children)

- *"In our system we start with the principle of testamentary freedom"* (cf. forced heirship)
- But award refused on grounds small estate divided between large number of Bs, none of whom significantly better off than Cs

Award refused or reduced

Miles v Miles [2018] WTLR 1347 (spouse in course of divorce)

- *"the deceased made a very clear decision... to exclude [C] from his assets. It is open to his court to re-write the will but in so doing there again must be regard that in so doing it is in the teeth of the wishes of the deceased"*
- Award reduced on appeal from whole estate to majority of estate

Award refused or reduced

Wellesley v Earl Cowley [2019] EWHC 11 (Ch) (adult child)

- Testamentary freedom "*the starting point*" and one of "*two propositions from Ilott that underpin the approach of the court to claims under the 1975 Act*"
- But award refused on basis of C's responsibility for long estrangement from Deceased

Award refused or reduced

Miles v Shearer [2021] EWHC 1000 (Ch) (adult children)

- *"...the deceased's wishes are a relevant matter which fall to be assessed in the round with the other relevant factors."*
- But award refused on basis Deceased ended financial support during lifetime and Cs lifestyle choices not dependent on expectation of assistance

Award: departure from TF not addressed

Lewis v Warner [2018] Ch 450 (co-habitant)

- Award of option to buy home at full market value affirmed by Court of Appeal
- Sir Geoffrey Vos C: *"I take full account of the strictures of the Supreme Court as to the freedom of testamentary disposition"*

Award: departure from TF not addressed

***Re R* [2018] Ch 450 (minor children)**

- Expressly excluded due to 'no contact for 3 years & their mother made clear she did not want him to be part of their lives'
- *"I have taken into account... the Deceased's testamentary wishes as contained in the 2018 Will and the accompanying Statement"*

Award: departure from TF not addressed

***SH v NH* [2020] EWHC 1134 (Fam) (adult child)**

- No reference to testator's wishes or testamentary freedom
- Judgment does not even cite relevant passages from *Ilott*

Award: departure from TF justified

Nahajec v Fowle, 18th July 2017 (HHJ Saffman) (adult child)

- *"Of course, the wishes of the deceased as set out in his note are factors that weigh in favour of [D]... the fact that a deceased explained his reasons for leaving his estate as set out in his will does not mean that the resultant provisions in the will are necessarily reasonable – especially where, as here, the reasons include a probable misunderstanding of the claimant's financial position"*

Award: departure from TF justified

Ubbi v Ubbi [2018] EWHC 1396 (Ch) (minor children)

- Will made early in Decd's relationship with Cs' mother, before conception
- *"Testamentary freedom is of course important. However given the factual context I do not infer that [the Deceased] consciously chose to exclude... any future children from his estate"*

Award: departure from TF justified

Thompson v Raggatt [2018] WTLR 1027 (co-habitant)

- *“It is not clear upon what he based his assertion that she was financially comfortable but on the evidence before me that was not a fair reflection of her financial situation then, and it is not now”*
- *“The predominant motive appears to be that he did not want any of his assets to fall into the hands of her children, and again that is not a sufficient reason for leaving her without any provision”*

Award: departure from TF justified

Clarke v Allen [2019] EWHC 1193 & 1194 (spouse)

- *"I must consider the weight I should attach to testamentary freedom"*
- *"[I agree that the Deceased's Will] did not provide what he wished, he executed it in the belief that his Daughters would not attempt to evict [C] and that he could not due to lack of capacity execute a new will to correct the position when the financial abuse of him and oppression of [C] was clear."*

Connection with expectation of benefit?

- Lack of expectation, long estrangement, and Deceased's clear wishes all dealt with together in *Ilott v Blue Cross* at [46-47]
- “*It cannot be ignored that an award under the Act is at the expense of those whom the testator intended to benefit*”: reason to depart from wishes undermined by lack of expectation due to estrangement, etc

Court's approach in summary

- *Miles v Miles* only reported case where C denied award expressly in order to uphold testamentary freedom
- Awards often made without reference to testamentary freedom or only paying lip service
- Weight reduced or extinguished if can identify mistake of fact or change of circumstances

Conclusions

- Defence or appeal against award very unlikely to succeed on testamentary freedom alone
- Court very ready to override testamentary freedom in favour of meritorious C: may look to justify, but may not
- Most likely to be given weight in adult child cases: free to exclude all except those for whom unreasonable not to provide?!



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Thank you,
any questions?

t 020 7242 6201

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