

**FIVE
STONE
BUILDINGS**

www.5sblaw.com

***ILOTT* AND BEYOND:
THE INHERITANCE
ACT IN THE
SPOTLIGHT**

Tuesday 11 April 2017

at

The Royal College of Surgeons
35-43 Lincoln's Inn Fields
London WC2A 3PE

3 hours

www.5sblaw.com

Programme

- 8.15 am-9.00 am **Registration and breakfast**
- 9.00 am-9.10 am **Introduction by James Aspden of Wilsons LLP**
- 9.10 am-9.50 am **Reactions to and impressions of *Ilott***
Penelope Reed QC and Hugh Cumber
- 9.50 am-10.20 am **Capitalising maintenance claims under the 1975 Act:
Duxbury v Ogden Tables**
Miranda Allardice
- 10.10 am-10.30 am ***Roberts v Fresco* [2017] EWHC 283 (Ch) – In Dead Men’s
Shoes?**
Mark Baxter
- 10.30 am-11.00 am **Refreshments**
- 11.00 am-11.25 am **Testamentary freedom from a comparative perspective**
Brian Sloan
- 11.25 am-11.45 am **Claims by cohabittees and the decision in *Williams v
Martin* [2017] EWHC 491 (Ch) and other developments
under the 1975 Act**
William East
- 11.45 am-12.30 pm **Panel discussion and Q&A**
- 12.30 pm **Close**

James Aspden specialises in resolving trust and probate disputes. His work ranges from claims concerning the validity and effect of wills, claims under the Inheritance (Provision for Family and Dependents) Act 1975, undue influence and equitable claims, to actions by or against trustees of landed estates and international trust disputes. He regularly acts for clients in mediation and other forms of alternative dispute resolution. James read Law at Somerville College, Oxford then trained at Sharpe Pritchard in London. He joined Henmans on qualification in 2002, and moved to Wilsons in June 2004. James is recommended in both the Legal 500 and Chambers, in which he has been ranked as a leading individual for the last nine years.

Memberships: Association of Contentious Trust and Probate Specialists (ACTAPS); Charity Law Association.

Client and Colleague Accolades: *“The team’s walking encyclopaedia on contentious trusts and probate.”* The 2014 edition of Legal 500 states that James is *‘totally reliable and on the ball’*.

Penelope Reed QC has a wide Chancery practice with special emphasis on trusts, wills, contentious probate, family provision claims and tax, both in the UK and overseas. She acted for the successful charities in their appeal to the Supreme Court in *Ilott v Mitson* [2017] UKSC 17. Penelope is recommended by all the leading directories, is described as *“faultless. Her advice is delivered succinctly and without hesitation, inspiring the greatest of confidence in both her instructing solicitors and her clients.”* She is praised for her mastery of contentious probate, trusts and capital tax matters. She is an accredited mediator, a member of STEP, ACTAPS and until recently was the chair of the Chancery Bar Association. She lectures and publishes widely on all areas of her expertise.

Hugh Cumber acted as junior counsel for the charities on their appeal to the Supreme Court, led by Penelope Reed QC. He was seconded to the Supreme Court of the United Kingdom and the Judicial Committee of the Privy Council for the 2014/15 legal year to act as Judicial Assistant to Lord Neuberger, the President of the Supreme Court. Hugh is developing a busy and diverse chancery practice and has experience across Chambers’ areas of expertise.

Miranda Allardice has extensive experience of Inheritance Act and probate claims, administration issues, constructive trust claims, Court of Protection work, and complex matrimonial finance claims. Miranda’s experience in family finance claims informs her busy Inheritance Act practice. Miranda acted for the charities before King J, in *Ilott v Mitson* [2010] 1 FLR 1613. She is a very experienced mediator. She is recommended in the Chambers UK 2017 as *“good on the more fraught matters – as a mediator she is very firm, practical and realistic, and clients like her”* and in 2016 as the *“go-to mediator for family cases concerning contentious probate estates”*. Miranda is a contributing author to *Jordan’s Inheritance Act Claims* and lectures widely on all areas of her practice.

Mark Baxter has a broad traditional chancery practice including a particular focus on contentious and non-contentious trusts and probate, tax, and Court of Protection work, and related professional negligence. He is recommended in two areas of practice in Chambers UK 2017, described as “*technically superb, is very good with clients, and is a very persuasive advocate who provides a tremendous service*”. Mark regularly lectures and contributes to professional journals on all areas of his practice and is co-author (with Penelope Reed) of *Risk and Negligence in Wills, Estates, and Trusts*. Mark recently appeared at first instance and on appeal in *Randall v Randall* [2014] EWHC 3134 (Ch), [2016] EWCA Civ 494, which is the leading case on standing to bring a contentious probate claim, as well as in *Roberts v Fresco* [2017] EWHC 283 (Ch), where he successfully resisted an attempt to bring an Inheritance Act claim by a deceased claimant’s estate.

Dr Brian Sloan is a College Lecturer and Fellow in Law at Robinson College, Cambridge. He is the author of *Borkowski’s Law of Succession* (3rd ed OUP, 2017) and *Informal Carers and Private Law* (Hart, 2013), as well as numerous papers on succession law, property law and family law. Brian is a winner of the University of Cambridge’s Yorke Prize.

More biographical information can be found at <http://www.law.cam.ac.uk/people/academic/bd-sloan/409>.

William East has a general chancery practice in all areas of work undertaken at 5 Stone Buildings. For nine months after completing pupillage he was a judicial assistant in the Supreme Court to Lords Walker and Dyson. He makes regular appearances in the High Court, County Court and the Court of Protection and is listed for the latter as a leading junior in Chambers UK 2017. In the 2016 directory he was praised for “*his financial and investment expertise alongside his family estate planning experience.*” He successfully acted with Penelope Reed QC in *Woodridge v Woodridge*, a claim by a surviving spouse under the Inheritance (Provision for Family and Dependents) Act 1975 in respect of a £6.8m estate. He is a member of the Bar Pro Bono Unit and also participates in the CLIPS scheme in the High Court giving free representation to litigants in person in the Chancery Division Applications Court. He has written for several professional publications and frequently lectures on areas of his practice.

These notes are intended as an aid to stimulate debate: delegates must take expert advice before taking or refraining from any action on the basis of these notes and the speaker can accept no responsibility or liability for any action or omission taken by delegates based on the information in these notes or the lectures.

FIVE
STONE
BUILDINGS

Reactions to and
Impressions of *Ilott*

Penelope Reed QC and Hugh Cumber

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

BACKGROUND: THE PROBLEM WITH ‘ADULT CHILDREN’

1. *Ilott v Mitson* was the first case under the 1975 Act (or the 1938 Act) to reach the highest Appellate level. It is worth pausing for a second to ask why that is. On the one hand the facts of the case are striking, notably the very considerable estrangement between mother and daughter (over 25 years) and the daughter’s almost total reliance on state benefits. On the other hand the case raises issues that are common to all claims involving “adult children”, who (in most cases) are financially independent from their parents and who their parents have no (legal) obligation to support.

2. As Lady Hale said at the opening of her concurring judgment:

“This case raises some profound questions about the nature of family obligations, the relationship between family obligations and the state, and the relationship between the freedom of property owners to dispose of their property as they see fit and their duty to fulfil their family obligations. All are raised by the facts of this case but none is answered by the legislation which we have to apply or by the work of the Law Commission which led to it.” (para.49)

3. She went on to bemoan the current state of the law and the Law Commission’s failure to consider these problems in 2011 when they consulted on this topic.¹ The problem the Supreme Court had to grapple with in *Ilott v Mitson* was gifted to them by the Law Commission in the 1970s.² The Law Commission were (as part of their wide project of family law reform) revisiting the categories of “children” who could bring a claim for family provision, and wished to depart from the limited categories allowed by the 1975 Act’s predecessor, the 1938 Act. This Act, a product of its time, allowed claims only by (1) sons under the age of 21; (2) unmarried daughters regardless of age; and (3) sons or daughters who “by reason of some mental or physical disability” were incapable

¹ *Ilott*, [66].

² Family Law 2nd report on Family Property Family Provision on Death Law Com No. 61 [74]–[78]

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

of maintaining themselves. It is clear that a likelihood of continuing actual dependency upon their parents is the common theme underlying all such potential applicants (albeit based upon the prevailing social attitudes of the 1930s).

4. The Law Commission considered (and rejected) the possibility of limiting claims to “actual dependency” or “special circumstances”. This was thought to be overly narrow. The solution the court decided to support was to allow claims by all children of the deceased, regardless of age and circumstances, considering that the court would “distinguish between the deserving and undeserving”. The Law Commission removed the restriction on claims by adult daughters to those who were unmarried, reasoning that it was “unlikely to lead to any substantial increase in the number of cases, since a married daughter whose husband is supporting her would not be likely to make or succeed in any application against the estate of her deceased parent”.
5. However, by including all children as potential applicants and including children as a class with the other maintenance applicants, the Law Commission (and the Act itself) give no guidance on how the court’s should distinguish between the deserving and undeserving. It is fair to say that it clear from the tenor of the Law Commission’s report that they clearly considered that claims by adult children who were capable of supporting themselves should not be able to claim.
6. Of course, the standard of maintenance which applies to adult children applies to most categories of applicants under the Act apart from the privileged category of spouses. However, it is fair to say that “adult child” claims have received particular attention from the appellate courts, and there is a long list of Court of Appeal authority grappling with the difficulties posed by this category of applicant.
7. Most of the cases above have concerned the question of whether the applicant is entitled to any provision at all. If the standing of the applicant is not in question, the traditional approach has always been first, to decide whether the way in which the estate

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

is disposed of under the will, or the intestacy rules, fails to make reasonable financial provision for the Applicant ('the threshold stage'); and secondly, if reasonable financial provision has not been made, whether any, and if so what, provision should be made for the Applicant ('the provision stage'). The first question has often been described as a value judgment and the second question a matter of discretion. Lord Hughes was perhaps not quite so keen on so rigid an approach. He said:-

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

8. The difficulty has therefore more frequently come at the threshold stage. The appeal to the Supreme Court in *Ilott* however involved an appeal at the provision stage which presented its own problems. Leave having been refused by the Supreme Court to appeal the first Court of Appeal decision in 2011, it was not open to the Supreme Court

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

to find that Mrs Ilott did not surmount the threshold stage although there were times during the submissions when some of the questioning suggested that at least some members of the Court would have been happy to reduce the award to nil.

THE SCOPE OF THE *ILOTT* DECISION

9. It will be recalled that, by the time the *Ilott* case reached the Court of Appeal for the second time the issue was limited to the question of quantum. It is a nice point whether a Court which has first determined that a will fails to make reasonable financial provision for an applicant (at the threshold stage) can ever then determine that no further provision should be made (at the provision stage). The Act appears to contemplate that this would be possible, but it hard to think of circumstances where this would be the case, and the Supreme Court appears to have proceeded on the assumption it was not open to it to award Mrs Ilott with nothing.
10. It is also worth noting that Lady Justice Arden was on the appeal panel of the Court of Appeal both in 2011 and 2015, and it is therefore interesting that, having determined that the exercise of discretion by the District Judge (at the threshold stage) was unimpeachable (essentially the ratio of the 2011 decision), she nevertheless succeeded in identifying two “fundamental” errors capable of vitiating his judgment at the provision stage. These were:
 - (a) he had held that the award should be limited, but he had not identified what the award would have been without these factors and thus the reduction attributable to them; and
 - (b) he had made his award of £50,000 without knowing what the effect of it would be upon the benefits (some of which were means-tested)
11. Having determined that he made these fundamental errors, Lady Justice Arden then went on to quantify the award herself (based on the facts as at the date of the 2015

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

hearing, despite the lack of satisfactory evidence on this issue, and despite submissions from both counsel that she should take the facts as they were before DJ Million).

12. This led the Court of Appeal to make the following award:
 - (a) £143,000 to buy the property she lived in (plus the purchase expenses);
 - (b) £20,000 to receive in instalments at Mrs Ilott's option.

13. The express reason for the option was to preserve entitlement to means-tested benefits, which have a capital limit of £16,000. It is apparent from this that the appeal raised the uncomfortable issue of the interaction between the discretionary provision of the 1975 Act and the public expense of maintaining individuals such as Mrs Ilott and her family who are heavily reliant on state benefits. There is a policy question (mentioned by Lady Hale in her judgment) whether it is appropriate to make an award aimed at relieving the public purse.

14. It was against this decision of the Court of Appeal that the charities appealed and were granted permission to appeal by the Supreme Court. The case came on immediately after the Brexit appeal and was (somewhat unusually) heard by a panel of seven justices, including the three most senior members of the Supreme Court, Lord Neuberger, Lady Hale and Lord Kerr. The Supreme Court heard the case over one day and gave its judgment three months later. The Court unanimously allowed the charities' appeal.

15. There were two stages to the charities' argument. The first was that there was simply no basis for the Court of Appeal to interfere with the exercise of discretion by the trial judge, and the Court of Appeal was wrong in the alleged "errors" in the judgment of the District Judge. If the charities were wrong on that ground, then the second stage of the argument was that the award made by the Court of Appeal was wrong in a number of important respects, and should itself be set aside. The appeal was

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

determined on the narrower ground that there had been no proper basis for the Court of Appeal to interfere with the trial judge's award.

16. The Supreme Court re-emphasised how broad the array of possible awards is, and consequently how difficult it will be to challenge decisions by trial judges on appeal. Most notably Lady Hale's judgement gave three options which were supportable on the (extreme) facts of this case:

"A respectable case could be made for at least three very different solutions:

- (1) *He might have declined to make any order at all. The applicant was self-sufficient, albeit largely dependent on public funds, and had been so for many years. She had no expectation of inheriting anything from her mother. She had not looked after her mother. She had not contributed to the acquisition of her mother's wealth. Rather than giving her mother pleasure, she had been a sad disappointment to her. The law has not, or not yet, recognised a public interest in expecting or obliging parents to support their adult children so as to save the public money. Thus it is not surprising that Eleanor King J regarded this as the reasonable result [2010] 1 FLR 1613. The Court of Appeal allowed the appeal on the basis that the district judge had not erred in law and the exercise of his discretion had not been plainly wrong, so Eleanor King J should not have interfered. But Sir Nicholas Wall P commented [2012] 2 FLR 170 that (as Wilson LJ had observed when giving permission to appeal) had the district judge dismissed the claim "I doubt very much whether the appellant would have secured reversal of that dismissal on appeal": para 59.*
- (2) *He might have decided to make an order which would have the dual benefits of giving the applicant what she most needed and saving the public purse the most money. That is in effect what the Court of Appeal did, by*

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

ordering the estate to pay enough money to enable her to buy the rented home which the housing association was willing to sell to her and a further lump sum to draw down as she saw fit. Housing is undoubtedly one of the first things that anyone needs for her maintenance, along with food and fuel. This was benefits-efficient from her point of view, because it preserved the family's claims to means-tested income benefits. It was benefits-efficient from the public's point of view, because it saved the substantial sums payable in housing benefit. She would lose the benefit of the landlord's repairing obligations, but how valuable this would be is a matter of speculation. It is difficult to reconcile the grant of an absolute interest in real property with the concept of reasonable provision for maintenance: buying the house and settling it upon her for life with reversion to the estate would be more compatible with that. But the court envisaged her being able to use the capital to provide herself with an income to meet her living costs in future.

- (3) *He might have done what in fact he did for the reasons he did. He reasoned that an income of £4,000 per year would provide her with her “share” of the household's tax credit entitlement and capitalised this in a rough and ready way, taking into account some future limited earning potential, at £50,000. He did not expressly consider, and was not presented with the information to enable him to consider, the effect that this would have on the family's benefit entitlements, and in particular the fact that they would lose their entitlement to housing benefit until their capital was reduced below £16,000.”*

17. However, it is fair to say that Lord Hughes’ judgment adopted many of the charities’ criticisms of Lady Justice Arden’s reasoning, including that:

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

- (a) the option of £20,000 didn't appear to work on its own terms (under the relevant regulations and guidance);
 - (b) the Court of Appeal gave little or no weight to the factor of very significant estrangement;
 - (c) the Court of Appeal had suggested erroneously that the charities had to justify their position as beneficiaries;
 - (d) the Court of Appeal had suggested erroneously that the being in receipt of benefits was akin to being disabled;
 - (e) the Court of Appeal had suggested erroneously that it was wrong to take into account testamentary wishes when carrying out the exercise required by the Act.
18. So while *Ilott* is on one level about the appellate jurisdiction and the distinction between value judgments and discretions, it also provides valuable and authoritative guidance on 1975 Act claims more generally.

GUIDANCE ON “MAINTENANCE”

19. Most centrally, the *Ilott* decision provides some valuable guidance on the concept of “maintenance” that will be of relevance in all maintenance claims under the Act, rather than just adult children. Centrally, maintenance is a “deliberate legislative choice” to limit the standard of provision.
20. Lord Hughes’ judgment provides some very helpful guidance on the approach the Court ought to take to maintenance. Indeed it might be regarded as a return to orthodoxy. While the concept is still broad, maintenance now clearly means less than

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

everything the claimant might reasonably want, though it is above subsistence level. In paragraph 14 Lord Hughes said:-

“The concept of maintenance is no doubt broad, but the distinction made by the differing paragraphs of section 1(2) shows that it cannot extend to any or everything which it would be desirable for the claimant to have. It must import provision to meet the everyday expenses of living”.

21. He then went on to approve the following (familiar) passage in *Re Dennis*

“The applicant has to show that the will fails to make provision for his maintenance: see In re Coventry (deceased) ... [1980] Ch 461 . In that case both Oliver J at first instance and Goff LJ in the Court of Appeal disapproved of the decision in In re Christie (deceased) ... [1979] Ch 168 , in which the judge had treated maintenance as being equivalent to providing for the well-being or benefit of the applicant. The word ‘maintenance’ is not as wide as that. The court has, up until now, declined to define the exact meaning of the word ‘maintenance’ and I am certainly not going to depart from that approach. But in my judgment the word ‘maintenance’ connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. The provision that is to be made is to meet recurring expenses, being expenses of living of an income nature. This does not mean that the provision need be by way of income payments. The provision can be by way of a lump sum, for example, to buy a house in which the applicant can be housed, thereby relieving him pro tanto of income expenditure. Nor am I suggesting that there may not be cases in which payment of existing debts may not be appropriate as a maintenance payment; for example, to pay the debts of an applicant in order to enable a him to continue to carry on a profit-making business or profession may well be for his maintenance.”

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

22. The Court also emphasised that maintenance is about providing income and not capital. This may prove to be one of the most significant aspects of the case. It should be said that a life interest in a house was not something either side had ever really canvassed in *Ilott*. Mrs Ilott wanted the money to purchase outright and the charities had always resisted that. There appeared to be some difficulty about a housing association property being held on life interest trusts for Mrs Ilott although in fact there might have been a way round that.
23. He further gave his seal of approval to the approach adopted by Munby J in *Re Myers* of providing housing by way of a life interest rather than outright provision. In that case (in which Miranda Allardice acted for the successful claimant) the Court determined that the applicant had a housing need, but that although there was ample property in the estate to provide a house for her outright, a life interest in a suitable property was appropriate, as the purpose of the Act was to provide for a reasonable maintenance need, not to provide legacies.
24. However, the real difficulty is that in many cases where the maintenance standard applies (whether the applicant is an adult child or a cohabitee or dependant) the last thing either party wants is a life interest. For the applicant it takes away control and the ability to use the proceeds of sale of the property for future care (although that issue can be resolved); for the remaindermen, they have the unedifying job of waiting for the life tenant to die and the problems of the property not being maintained. It is perhaps easier for charities but still not ideal.
25. The suggestion in the course of argument by the Supreme Court that a life interest would have been the appropriate way forward had to be grabbed by the charities as a way out if defeat was the alternative but they did not positively advocate that approach.
26. There is no doubt this is going to cause some difficulty of a practical nature going forward. There is no doubt in my view as a matter of principle Lord Hughes' approach

Reaction and Impressions

**Penelope Reed QC and Hugh
Cumber**

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

is correct: it may just give rise to difficulties in practice. Of course it must be remembered that despite this stated preference for a life interest, the Supreme Court acknowledges that more often than not the parties will prefer a clean break.

27. A point on which some time was spent in written submissions but which was not dwelt on by the Supreme Court was the question of the appropriate standard of provision. The standard authority to refer to in this regard is the Canadian case of *Duranceau*, cited with approval in many cases subsequently (notably *Coventry* and the cases following it), and the applicant's "station in life". We submitted that this meant the standard of provision was to be determined, at least to some extent, by the applicant's existing circumstances. It was submitted on behalf of Mrs Ilott that the standard provided by the Joseph Rowntree foundation offered a modern definition of "subsistence" of which the court could take judicial notice (noting that state benefits did not provide this minimum standard). This approach does not appear to have found favour with the Supreme Court, though it might be said to provide a helpful cross-check for subsistence level.
28. Although the Supreme Court was careful to emphasise that one does not start with a hypothetical standard of provision and then detract from it (like a judge assessing contributory negligence), it is nonetheless apparent from Lord Hughes' judgment that he considered an applicant's proven financial need to be something of a ceiling on an award. This supported the view that other factors, such as an estrangement, would point towards a lower award. Testamentary wishes appear to have been brought in at this stage as a discounting factor as well, though it remains to be seen how this approach would be applied in the context of an intestacy.
29. An unfortunate side effect of the weight placed on estrangement is that it invites exactly the kind of lengthy debates about conduct that are so unattractive to judges and legal representatives (and yet so appealing to litigants). Perhaps in the future the courts will

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

adopt an approach akin to the closely analogous matrimonial legislation where only very serious conduct will be given much weight.

A RETURN TO “MORAL OBLIGATIONS”?

30. Although it has long been clear that it is a fallacy that moral obligations are a prerequisite for an adult child’s claim to succeed, Lord Hughes’ judgment reiterates that in a normal case it is something more than the qualifying relationship and a financial need. He calls need a “necessary but not sufficient condition”.
31. It is therefore the search for “something more” that will continue to exercise those acting for Claimants. In past cases where adult children have succeeded the extra factor has been very varied:
- (a) cases where the applicant suffers a mental or physical disability;³
 - (b) cases where the child has worked in a family business and has expected to inherit;⁴

³ *Re Wood* [1982] LS Gaz R 774.

⁴ *Re Campbell* [1983] NI 10 where a son had lived on his father’s farm since birth and worked on the farm all his adult life; *Re Creaney* [1983] NI 397 where a son went to work in the family shop for low wages and who received the business (which ceased trading); *Re Abram* [1996] 1 FLR 379 where the child worked in the deceased’s business for very low wages.

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

- (c) a failed mutual will agreement under which husband and wife agreed to provide for their son on the death of the survivor, and the survivor made a new will in favour of his second wife;⁵ and
 - (d) claims by children who have made personal sacrifice to care for an aged parent.⁶
32. This latter example was given strong judicial support by Lord Hughes, envisaging a very close parent-child relationship.
33. An interesting test-case is the wealthy applicant in the context of a large estate. Will judges now follow Lord Hughes' suggestion and find that in the absence of a proven reasonable need such a claim will necessarily fail? Would it make a difference if the applicant was the "good daughter" who made personal sacrifices to assist her parent?

CONCLUSION: WHAT'S NEXT FOR 1975 ACT CLAIMS?

34. As noted already, this is an authoritative decision (carrying the weight of a unanimous Supreme Court) and unlikely to be departed from in the future (subject of course to change of the underlying legislation, a possibility alluded to by Lady Hale).
35. One loose thread following the judgment is the possibility that an award might be made to alleviate the public purse or as Lady Hale put it "the public interest in family members discharging their responsibilities towards one another so that these do not fall upon the state". With respect to this suggestion, this does not answer the prior question of what the content of these "responsibilities" might be, which is the central thrust of Lady Hale's judgment; the Act simply does not make the normative judgment of what obligations are owed by a parent to a child as far as the inter-

⁵ *Re Goodchild* [1996] 1 WLR 694 per Carnwath J (as he then was), upheld on appeal.

⁶ See dicta in *Re Jennings* per Henry LJ, with the qualification that the purpose of the 1975 Act is not to reward meritorious conduct.

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

generational transfer of wealth is concerned. The closest Parliament has come to doing this is in the intestacy provisions (revisited in 2011) and it might be thought unlikely that these provisions will be revisited again given its likely future agenda.

36. *Ilott* will be helpful to practitioners, and the law (despite Lady Hale's concerns) is now in a better state than it was following the decision of the Court of Appeal in 2015. Nonetheless, there are some important limits to the scope of the judgment, and it is readily apparent that 1975 claims are just as risky and unpredictable as they ever were.

preed@5sblaw.com

© Penelope Reed 2017

hcumber@5sblaw.com

© Hugh Cumber 2017

FIVE
STONE
BUILDINGS

**Capitalising maintenance
claims under the 1975 Act:
Duxbury v Ogden Tables**

Miranda Allardice

FIVE
STONE
BUILDINGS

Capitalising maintenance claims under
the 1975 Act: Duxbury v Ogden Tables

Miranda Allardice
5 Stone Buildings
11 April 2017

www.5sblaw.com

Health Warning

FIVE
STONE
BUILDINGS

- The current attitude of the courts hearing claims under the Inheritance (Family and Dependents) Act 1975 "the 1975 Act" endorses the use of the Duxbury Tables
- See the cases: *Re Myers* [2004] EWHC 1944, *Fielden v Cunliffe* [2005] EWCA Civ 1508, *Lilleyman v Lilleyman* [2012] EWHC 821
- *Hott* in the Supreme Court [para 15] states that rather than periodical payments for maintenance it will very often be more appropriate:
- *"If income is provided by way of a lump sum from which both income and capital can be drawn over the years for example on the Duxbury model familiar to family lawyers (see Duxbury v Duxbury (Note) [1992] Fam 62).*
- Rather the purpose of this presentation is to explore the widening differences in the lump sums suggested by the two methods of capitalisation, and ask whether there should be a greater willingness to adopt the Ogden Tables.

<p>Duxbury History</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • The Duxbury Tables take their name from the case <i>Duxbury v Duxbury</i> [1992] Fam 62n where the methodology was first employed by an accountant, for use in a financial remedy claim under the Matrimonial Causes Act 1973 “the 1973 Act” • The task he was set being to determine the capital sum necessary to provide over the assumed life expectation of the recipient an income that is spendable (ie net of tax). The recipient is to have resort to both the income and the capital of the fund, on the assumption that at the date of her expected demise the sum will have been spent • As Singer J vividly put it in a talk in 1992, on the day that the recipient dredges her last glass of champagne with her final breath she should expire along with her Duxbury Fund • From 1991 the Family Law Bar published “At A Glance”, which included the Duxbury Tables • As a result it is exceedingly rare for there to be a need for accountants to provide alternative figures in financial remedy cases. 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>Duxbury</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Duckworth: Matrimonial Property & Finance contains a clear definition of the Duxbury calculators. • C[27] “Essentially Duxbury is a cash flow projection built around three components: • (1) an annual income requirement or “budget” • (2) the statistical life expectancy of the recipient • (3) a discount rate, representing the “real return” over inflation of money invested in a spread of equities and gilts. Note that the lower the discount rate the higher the sum. • The combination of these factors then produces a lump sum which, <u>in theory</u> (my emphasis) suffices to meet the income needs of the applicant over his or her natural lifespan, allowing for the effects of tax and inflation”. 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>

*Hott and Beyond: The Inheritance Act
in the Spotlight*

<p>Duxbury & rates of return</p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • The 3 key assumptions made in the calculations are: <ul style="list-style-type: none"> (i) an average income yield of 3% pa (ii) average capital growth of 3.75% pa gross (iii) average inflation of 3% • The creators opine that; <i>“history tells us that average real returns of 3.75% pa are - over the long term – achievable even with a cautious investment strategy. Interest rates remain low, and while the stock market indices have fallen sharply from record levels in March 2015, over the longer term both capital growth and income yield from a balanced portfolio remain achievable”.</i> • Therefore it is expected that the recipient will have a mixed portfolio of investments. The aim underpinning the Duxbury Tables is to represent a capitalisation of what would otherwise be variable periodical payments following the divorce of the parties. 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>Mostyn J in <i>JL v SL</i></p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Mostyn J in <i>JL v SL</i> [2015] EWHC 555 (Fam) gives a helpful exposition of Duxbury at [para 13] • <i>“It is important to remember that a Duxbury fund is usually calculated over a long period. [30 years in that case]. The key assumption is that over a longish period it can be reasonably predicted that a fund will perform in actual gross terms by 6.75% annually (ie 3% income yield plus 3.75% capital growth) but the owner of the fund will suffer inflation of 3% thus giving a real rate of return of 3.75%. Is this a reasonable guess? (!) My exclamation</i> • He goes on to review indices of FTSE 100 ... <i>“this corresponds to capital growth in that 30 year period of 5.74% annually, the FTSE -250 8.8% & the Dow Jones 6.9%. Thus it can be seen that the rate of capital return assumed in the Duxbury algorithm of just 3.75% is somewhat cautious, recognising that other kinds of investment are likely to achieve lower capital sums. Plus the RPI suggests over 30 years inflation at 3.49% annually.</i> 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>

*Hott and Beyond: The Inheritance Act
in the Spotlight*

<p>Policy issues</p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Had the marriage continued without a divorce a spouse may well have suffered the financial problems of the other; “for richer or poorer, in sickness and in health” springs to mind. • This potential for uncertainty in the future led Duckworth to state: • C[28] ..“it is unprincipled to suggest that wives should be wrapped in cotton wool, like severe personal injury claimants”. • <i>White v White</i> [2001] 1 AC 596, @ 609 led to the consideration of yardstick of equality of sharing of matrimonial property capital. Because of a significant discrepancy in earning power often periodical payments also are liable to be paid • <i>White</i> endorses the use of the Duxbury Tables as the guide to the capitalisation of the periodical payments, under the 1973 Act • What of the widow or widower under a 1975 Act claim, where their deceased’s spouse needs no longer have to be met. Why should the surviving spouse not be treated as a cautious investor for the remainder of their lives? 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>Ogden Tables</p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • The Ogden Tables were first compiled in 1984, for the purpose assessing the lump sum necessary as compensation for either a pecuniary loss or ongoing expense as the result of a personal injury action • The methodology involved is that a multiplier is applied to a figure which represents the annual loss, the multiplicand, in order to calculate a capitalised sum, which factors in matters such as accelerated receipt, life expectancy. • The higher the interest rate the lower the number of years’ purchase that is required to calculate the capital value • See Facts & Figures Tables for the Calculation of Damages (<u>beware need to refer to new Tables 1 & 2 providing multipliers for pecuniary loss for life for both male & female</u>), with a range depending on rates of return • The Ogden Tables were endorsed by the House of Lords in the case of <i>Wells v Wells</i> [1999] 1 AC 345. In the case the HL concluded that for the personal injury claimant the discount rate should be based on the yields on Index Linked Government Stock. 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>

Hott and Beyond: The Inheritance Act in the Spotlight

<p>The Ogden process</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • There is an extremely cogent exposition of the theory behind the Ogden Tables in the case of <i>Simon v Helmot</i>, [2009-10] GLR 465 in the Judgment of Lord Hope [paras 13-14] • <i>“The recurring annual amount has first to be determined. That is the multiplicand, to which a multiplier is then applied... one then has to determine the interest rate which represents the return which can reasonably be expected on the lump sum, assuming that it is invested in such a way as to enable the whole amount of the loss to be met during the entire period by the expenditure of income together with capital. This is the critical stage in the exercise. <u>The higher the interest rate the lower the number of years’ purchase that is required to calculate the capital value of the annuity.</u>”</i> • Note it is not annuity as there is a finite pot which may run out before death • The problem in recent years has been the low level of interest. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Problem with low interest rates</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Lord Hope continues at [para 14] • <i>“It has been assumed until very recently that it will be possible to achieve a rate of return on capital which will more than offset the effects of inflation on the amount of the award. This has led to the assumption that the choice of interest rate will always take the form of a discount for the accelerated receipt of the lump sum. One of the issues in this case is whether the law allows the court to adjust the lump sum in the other direction if the evidence shows that the rate of inflation will outpace the rate of return on capital... The effect of such an adjustment is to increase, rather than reduce, the number of years used as the multiplier. <u>The use of the word “discount” is not an apt way of describing the exercise.</u>”</i> • The UKPC upheld the CA’s conclusion that it was appropriate for the Guernsey courts to adopt a rate of -1.5% for the earnings related loss & 0.5% for other future losses. • This case increased the pressure on the Lord Chancellor to revisit the 2.5% discount rate. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>2017 new discount rate personal injury FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • The Lord Chancellor & Justice Secretary Elizabeth Truss on 27 February 2017 announced a change to the Discount rate from 2.5% to -0.75%, with effect from 20 March 2017 • The Press Release states <i>"The law makes it clear that claimants must be treated as risk adverse investors, reflecting the fact that they are financially dependent upon this lump sum, often for long periods or the duration of their life"</i>. • The LC based her decision upon the same <i>Wells</i> considerations: a 3 year average of index-linked gilts, which have declined substantially since the financial crisis and show no sign of rising again. • In the face of an outcry from insurers and due to severe ramifications for the NHS there is to be a consultation! • The impact is dramatic, and can be graphically illustrated by a spot check of the old and new Tables. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>The old & new Ogden Tables FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • See the new issued Tables at https://www.gov.uk/government/publications/ogden-tables-actuarial-compensation-tables-for-injury-and-death • Worked example from new Table 2 Multiplier for pecuniary loss for life (females) • 60 year old female multiplier is 32.68 (at new -0.75%) so if require £10,000 pa $32.68 \times £10,000 = \underline{£320,680}$ • Under the old Tables from Facts & Figures 2016/17 would be • Multiplier of 19.83 (at old -2.5%) so if required £10,000 pa • $19.83 \times £10,000 = \underline{£190,830}$ on the old Tables <p>A very significant difference in level of award necessary if all the capital is to be invested in gilts, with such a low rate of return.</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>Know your Duxbury</p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • It is vital that there is a clear understanding of what the Duxbury Tables achieve when conducting a 1975 Act case • We have seen above that the Tables are predicated on a rate of return that most IFAs would be concerned were not achievable with the Clapham Omnibus cautious investor. See below for a discussion as to the case law and the 1975 Act, and the current preference for Duxbury • There are 2 other central features that need to be considered: <ul style="list-style-type: none"> • (i) The State Pension & the Tables • (ii) The problem of life expectancy 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>The State Pension & Duxbury Tables</p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • The capital sum suggested for the capitalisation of any income need is predicated on the premise that the recipient will also receive a full state pension. • This is set out (albeit not very clearly signposted) in the Notes to Table 11, in listing the underlying assumptions the recipient will: <ul style="list-style-type: none"> • (8) be or become entitled to a “full” state pension • (9) that pension will increase at the assumed rate of inflation • (10) the age from which the state pension is payable will not alter in the meantime • <u>The inclusion of the state pension will have material effect upon the correct use of the Tables.</u> • The State Pension payable from April 2016 is a flat rate of £155.65 pw or £8,000 pa, see Table 21 At A Glance. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>Reading the Tables</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • It is essential to have regard to the inclusion of the State Pension in the basic income figure. The At A Glance 2017-2018 will definitely incorporate the new higher pension figures • Hence if you wish to ensure that the C has a <u>total income of £20,000 pa</u> from all sources, the State Pension will make up now £8,000 pa of that figure • If therefore in a 1975 Act claim it is agreed the Estate will make up the shortfall of £12,000 pa for the 65 year old female the correct figure to be adopted from Table 11 will be for the £20,000 representing the total income needs. • The suggested capital figure will be £216,000. <u>BUT that will only be for the cost of providing for the £12,000 pa. The remainder will be provided by the State.</u> • This understanding is absolutely central to ensuring that the C is not grossly under compensated. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Capitalise – Class Legal</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • The basic Duxbury Tables are therefore not user friendly. In most cases one will be looking to add to a basic level of income that C already has • Plus the Tables only go up in increments of £5,000, and one is left trying to extrapolate the correct capital sum for the in between figure! • A more advanced programme is to be found in the CAPITALISE Manual published by Class Legal, note that whilst CAPITALISE will automatically add a full State Pension, this can be de-selected, to create a calculation as to the net additional income required • The contrast between the net effect of the new Ogden Tables and the Duxbury using our 65 year old C, who requires an income of £20,000 pa i(but already in receipt of the State Pension) s stark: • Duxbury (including State Pension) £20,000 suggests £216,000 • Ogden @ -0.75% multiplier is 26.74 x £12,000 shortfall suggests £320,880. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>Life Expectancy</p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • The Notes to Table 11 give a health warning as to the dangers of relying on the Duxbury Tables for the elderly • <i>“but the usefulness of Duxbury calculations for recipients with a life expectancy of less than about 15 years (women over about 76 and men over about 73) may be questioned</i> • <i>The proportionate margin of error in relation to life expectancy (in particular) is also extremely high, <u>with some recipients living more than twice longer than expected</u></i> • <i>And the shorter the expectancy the less likely it is that the average returns will return to those historically achievable over longer terms</i> • Therefore there is a real risk of a double disadvantage • That the C will outlive the funds AND • The low rates of return will not even provide for the level of income over the statistically life expectancy. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Life Expectancy</p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • The Notes to Table 11 give a health warning as to the dangers of relying on the Duxbury Tables for the elderly • <i>“but the usefulness of Duxbury calculations for recipients with a life expectancy of less than about 15 years (women over about 76 and men over about 73) may be questioned</i> • <i>The proportionate margin of error in relation to life expectancy (in particular) is also extremely high, <u>with some recipients living more than twice longer than expected</u></i> • <i>And the shorter the expectancy the less likely it is that the average returns will return to those historically achievable over longer terms</i> • Therefore there is a real risk of a double disadvantage • That the C will outlive the funds AND • The low rates of return will not even provide for the level of income over the statistically life expectancy. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>Mitigating the risk</p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • The problem of blind adherence to statistical life expectancy tables is eloquently reviewed in the case of <i>A v A (Elderly Applicant; Lump Sum)</i> [1999] 2 FLR 969 by Singer J @979 • <i>“Survival can thus be described as a continuously encouraging and refreshing process; each year the individual survives along the way increases the statistical chance that he will meet and perhaps survive what was the preceding year’s prediction of his life expectancy</i> • So that there is a real risk of an updated life expectancy and the effect <i>“would then be penurious if not bankrupt living [which] will make a poor endurance prize!”</i> • The prospect of outliving her maintenance fund was a major concern of Ms Myers, who had a number of long lived aunts • This was the subject of argument before Munby J (as he then was) in the case of <i>Re Myers (deceased)</i> EWHC [2004] EWHC 1944. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>The arguments</p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • I argued that the C should have her property awarded to her outright as it would serve as a reserve eg for residential care home fees if she outlived her life expectancy. I failed, and her property was to be held on trust with her having a life interest only • However Munby J did agree that the trustees of the life interest, should be able to advance capital • <i>“First, the trustees of the fund will have power at any time in their absolute discretion to apply any part of the capital of the fund in such manner as they think fit for or towards the maintenance of the claimant. <u>Secondly, from and after the claimant’s 88th birthday, if she lives that long, the trustees will be required from time to time, if so requested by the claimant, to apply such part of the capital of the fund as may in all the circumstances, and having regard to the claimant’s other resources, reasonably be required for her maintenance (including the ongoing costs of her housing or other accommodation)”.</u></i> 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

<p>Ilott</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • The CA Arden LJ expressly envisaged that the award of the property to the C outright would facilitate her accessing funds in her old age eg by equity release • The Supreme Court expressly rejected this approach of outright ownership of the property stating that the statutory power is to provide for maintenance and not confer capital on the claimant • Lord Hughes citing the Munby J compromise of using the trust fund if necessary stated; <i>“provision which included housing, but he did so by way not of an outright capital sum of a life interest in a trust fund together with power of advancement designed to cater for the possibility of care expenses in advanced old age. If housing is provided by the way of maintenance, it is likely more often to be provided by such a life interest rather than by a capital sum.”</i> 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Wedded to Duxbury</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • The Duxbury Tables which were developed for the purpose of capitalising periodical payments after a divorce under the Matrimonial Causes Act 1973 have been adopted, (with only limited questioning) by the family provision courts under the 1975 Inheritance Act • The Family Courts hearing 1975 Act claims were clearly comfortable with the use of the Duxbury Tables, in every day financial remedy proceedings, and it has obviated the need for expert evidence in such cases. But recipient spouse is expected to have a long period in which to ride the stock market investing in equities etc • The Court of Appeal in <i>Re Scott-Kilvert Robinson & Fernsby</i> [2003] EWCA Civ 1820 & in <i>Fielden v Cunliffe</i> [2005] EWCA Civ 1508, adopted Duxbury, • In <i>Re Myers</i> Munby rejected an attempt to carry out a cross-check with the Ogden Tables • BUT the retired, financially risk averse C is not going to command a high level of return from their funds. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>Re Besterman cushion</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Where there is a 1975 claim brought by a surviving spouse, that spouse will have been entitled to a share of the family assets. Post <i>White</i> the equal sharing principle may well have been engaged, in relation to the capital assets, separate from the need for ongoing maintenance • Prior to <i>White</i> when (usually the wife) were confined to satisfaction of their reasonable requirements for maintenance, a practice grew up of ensuring there was a capital cushion • The “<i>Besterman cushion</i>” comes from <i>Re Besterman Deceased</i> [1984] Ch 458, a 1975 Act case, and is an acknowledgment of a contingency fund • While in the 1973 Act jurisdiction it has fallen out of favour, as spouses receive their share of the matrimonial capital, the <i>Besterman</i> argument may be employed in 1975 Act cases for the other classes of claimant • This would provide a contingency fund, to partially offset the <i>Duxbury</i> problem • This topic deserves further debate for “maintenance” claimants. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Attitude to C’s capital</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • There are a number of ways that a court might ameliorate the “pure” maintenance capitalisation process • This may include a more sympathetic approach to the capital that C herself has. So in <i>Re Myers</i> the C had a valuable portfolio of shares gifted by her father • One approach might have been to seek to deduct that capital value of them from the capitalised maintenance need, and give her only the balance • Or as <i>Munby J</i> did which was to ascribe an income stream only from the shares and leave the capital out of the equation • Pending a radical sea change of the preferred Tables there are more subtle ways of a court softening the potentially harsh impact of a hard <i>Duxbury</i> calculation. 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

mallardice@5sblaw.com
© Miranda Allardice 2017

FIVE
STONE
BUILDINGS

***ROBERTS v FRESCO* [2017] EWHC
283 (Ch) – IN DEAD MEN’S SHOES?**

Mark Baxter

THE IMPACT OF DEATH ON AN INHERITANCE ACT CLAIM

The established 1975 Act authorities

37. There is long-established first instance authority that in the event of the death of a 1975 Act claimant or would-be claimant their claim may not be brought or continued by their Personal Representatives: all the specialist texts – such as Francis, *Inheritance Act Claims: Law, Practice and Procedure* (2003) and Ross, *Inheritance Act Claims* (3rd ed, 2011) – confidently state that is the law.
38. The first decision on the point is *Whytte v Ticehurst* [1986] Fam 64. There, the surviving wife’s Personal Representatives were refused permission to continue the claim brought by her before her death:

“I am satisfied that the basis of the right to claim under the Inheritance (Provision for Family and Dependents) Act 1975 is the same as that under the Matrimonial Causes Act 1973 and arises from the relationship of the two parties to the marriage. In my judgment the claim that may be made on the death of one party is personal to the survivor. Upon the death of both parties to the marriage the claim must cease to exist. Only when an order has been made upon a claim is there an enforceable cause of action which would continue to subsist for the benefit of one estate against the other.”

39. That decision was confirmed again at first instance soon after in *Re Bramwell* [1988] 2 FLR 263, this time preventing the surviving wife’s Personal Representatives from commencing a claim on the basis that they did not have such cause of action.

The divorce authorities

40. Both 1975 Act decisions relied heavily on decisions to the like effect under the Court’s statutory jurisdiction to grant financial remedies between divorced spouses, most recently the Matrimonial Causes Act 1973.

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

41. Those cases focused on when a cause of action under the relevant statute arose, because pursuant to the Law Reform (Miscellaneous Provisions) Act 1973, s.1(1), (subject to a couple of specific exceptions) “*on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate*”; i.e. if it arose before death, it would vest in the deceased claimant’s Personal Representatives and they could pursue it. A cause of action is “*simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person*” (*Letang v Cooper* [1965] 1 QB 232).
42. The conclusions in the main cases may be summarised as establishing that the jurisdiction conferred by the matrimonial statutes is both discretionary and predicated upon two living parties, such that a right to apply is not a cause of action of the type to which the 1934 Act, s.1(1) applies:
- (a) *Sugden v Sugden* [1957] P 120: “*there is no right to maintenance, or to costs, or to secured provision or the like, until the court makes an order directing it. There is, therefore, no cause of action for such matters until an order is made.*”
 - (b) *Barder v Barder* [1988] AC 20 (HL): whether a cause of action survives death is to be determined by reference to the
 - (i) nature of the further proceedings sought to be taken;
 - (ii) true construction of the relevant statutory provision;
 - (iii) applicability of the 1934 Act, s.1(1).
 - (c) *Janan Harb v King Fahd Bin Abdul Aziz (No.2)* [2005] EWCA Civ 1324:
 - (i) *approved Barder & cases relied upon;*

Roberts v Fresco [2017] EWHC 284 (Ch)

Mark Baxter

***Ilott and Beyond: The Inheritance Act
in the Spotlight***

- (ii) *the relevant statutory sections make implicit reference to a subsisting marriage and a living respondent so limited to an application made during their joint lives.*

43. Thus, if the relevant statute confers on the would-be claimant merely a right to apply to the Court for it to exercise its jurisdiction on the basis of its assessments of various factors, rather than sets out the limbs of a legal test, then the *Letang v Cooper* test is not met until the Court decides to exercise its jurisdiction.

The facts of Roberts v Fresco and the initial claims

44. Pauline Milbour died leaving her husband Lennie Milbour, daughter Luanne Fresco, step-daughter Laurel Roberts, and step-granddaughter Francesca Milbour (daughter of Lennie's pre-deceased son). Pauline and Lennie married in 1973, when Laurel was 19 years old.

45. Pauline's estate amount to almost £16.8 million, of which around £16.1 million consisted of the value of her shareholding in the four-generation old family hotel business. In addition, the matrimonial home was held in a trust created by Pauline when she purchased it with the divorce award from her first marriage: it was held for Pauline for life, subject thereto for Luanne (or Lennie if she pre-deceased).

46. Pauline's Will provided for a pecuniary legacy of £150,000 to Lennie and provided him with the income of £75,000 for his life (to supplement generous pension provision she had arranged for him); otherwise, her estate went to Luanne. Just eight months later, Lennie died. His estate was a little over £300,000 (including his legacy from Pauline) and was divided between Laurel and Francesca equally.

47. Claims were issued by Laurel and Francesca against Pauline's estate – Laurel claiming as a child of the family or else as a person being maintained by Pauline, and Francesca claimed as a person being maintained by Pauline. There were two key problems with those claims:

Roberts v Fresco [2017] EWHC 284 (Ch)

Mark Baxter

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

- (a) First, there was clear evidence of a very poor relationship between Laurel and Pauline from the off;
- (b) Second, any maintenance was paid by Lennie (albeit from money given to him by Pauline).

The attempted amendments

48. Accordingly, the claimants applied to amend their Claim Form to introduce two new claims:
- (a) a surviving spouse's claim by Lennie's estate against Pauline's estate;
 - (b) a claim by Laurel against Lennie's estate for the purpose of seeking an order under s.2(1)(f) of the 1975 Act varying the nuptial settlement of the matrimonial home to make provision for her.
49. The application was listed for a day's hearing, with the question whether the first new claim was possible as a question of law treated as a preliminary issue, heard by Simon Monty QC sitting as a deputy High Court judge.

The claim by Lennie's estate - judgment

50. The judgment on the preliminary issue focused on a close analysis of s.3 of the 1975 Act and at what point a cause of action that could survive the claimant's death arose as a result thereof.
51. His conclusion was (a) that the right to apply under s.1 of the 1975 Act was not a cause of action because there is no set of facts that, if proven, entitle the applicant to an award (or even to the Court exercising its discretion as to whether to grant an

award), and (b) that it would not be a cause of action that could survive death in any event. So much is clear from s.3 because:

- (a) The judge must undertake a two-stage decision-making process to decide, first, whether reasonable financial provision has not been made (whether there is a claim), and, if it has not, second, whether and in what way they will exercise their powers to make an award (whether there should be a remedy):
 - (i) the judge must take into account the facts under s.3, but it is not the case that if the applicant proves certain such facts it follows that reasonable financial provision has not been made for them;
 - (ii) rather, whether or not the applicant has made out a case for the judge to consider making an award is a ‘value judgment’ or ‘qualitative decision’, and it is only when that judgment is made in favour of the applicant (at the earliest) that a cause of action arises;
- (b) In any event, the s.3 exercise could not be carried out by a judge if the applicant was dead at the date of trial because several of the factors they are required to take into account – such as the applicant’s present and future financial needs and resources, and their age – pre-suppose there is a living applicant at the time: that is the clearest indication that Parliament did not intend 1975 Act claims to survive death.

52. The deputy judge also expressly approved *Sugden*, *Barder*, *Whytten v Ticehurst*, and *Re Bramwell*. Accordingly, it seems clear that it will take a decision of the Court of Appeal (if not the Supreme Court, given that *Barder* is a House of Lords decision) or legislation to enable a 1975 Act claim to be brought on behalf of a deceased applicant.

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

‘A CHILD OF THE FAMILY’

The claim against Lennie’s estate

53. If the first new claim was always optimistic, the second new claim is an impressive attempt to get round the three problems that remained for the claimants if the claim by Lennie’s estate was blocked, namely (i) the problems with their claims against Pauline’s estate, (ii) the small size of Lennie’s estate, and (iii) the fact they took the whole of Lennie’s estate in any event.
54. The aim behind the claim was to benefit both claimants by increasing the pot available to make an award to Laurel, and so allowing the Court the freedom to adjust the division of Lennie’s estate in favour of Francesca.

Relevant test

55. In order for the Court to exercise its power under s.2(1)(f) of the 1975 Act, it would be necessary for Laurel to establish first, that the trust of the matrimonial home is a nuptial settlement made on Pauline and Lennie (the contrary being very difficult to argue), and second, that she is within one of the classes of persons in whose favour it can do so, namely:
- (a) the surviving party to the marriage to which the settlement relates;
 - (b) any child of that marriage;
 - (c) any person who was treated by the deceased as a child of the family in relation to that marriage.
56. Clearly, Laurel could possibly be within only the last of those categories. The burden would be on her to prove that Lennie treated her as a child of the family in relation to his marriage to Pauline.

Roberts v Fresco [2017] EWHC 284 (Ch)

Mark Baxter

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

57. As the decision concerned only whether Laurel should be allowed to bring the claim though, the test being applied by the deputy judge was limited to the low one of whether there was a real prospect of success. Nevertheless, it is arguable that even this low threshold cannot be met because of two fundamental problems:

- (a) First, there is the conceptual problem of whether a person's natural parent can treat their own child as a child of a family in relation to a marriage that is not the marriage that produced that person: treating someone as a child of the family involves treating them as though they are your child, and is that possible when they are your child?
- (b) Second, even if that is conceptually possible, how could a Court ever be satisfied that was the case on the evidence: could it properly determine that evidence of a relationship between the parent and child of the necessary quality indicated treatment as a child of the family and was not simply the product of the fact they were parent and child?

58. Those difficulties are demonstrated by the test the Court is required to apply to determine whether someone was treated by the deceased as a child of the family:

- (a) *Re Callaghan* [1985] Fam 1, 6A-C:

“the acknowledgement by the deceased of his own role of grandfather to the plaintiff's children, the confidences as to his property and financial affairs which he placed in the plaintiff and his dependence upon the plaintiff to care for him in his last illness are examples of the deceased's treatment of the plaintiff as a child...All these things are part of the privileges and duties of two persons who, in regard to each other, stand in the relationship of parent and child.”

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

(b) *Re Leach* [1986] Ch 226, 235D-E:

“the legislature cannot have contemplated that the mere display of affection, kindness or hospitality by a step-parent towards a step-child will by itself involve the treatment by the step-parent of the step-child as a child of the family in relation to the marriage...Something more is needed: reasonable step-parents can usually be expected to behave in a civilised and friendly manner towards their step-children, if only for the sake of their spouse.”

59. So what the Court would be looking for is a relationship between Lennie and Laurel that it would expect to see anyway as a result of their being father and daughter: if that relationship is present, how can the Court determine whether it relates to Lennie’s marriage to Pauline? It might be tempting for them to examine the relationship between Laurel and Pauline, but that is the wrong relationship to examine.

Judgment

60. The deputy judge did not perceive a conceptual problem and granted permission to amend the claim form to include the claim against Lennie’s estate: on this point he relied on the accepted position in matrimonial law that one person can be treated as a child of the family by several different persons. That answers a different question, though.

61. That would mean, of course, that if the claim was pursued at trial, it would be a question of fact whether Laurel had discharged the burden on her of proving that Lennie treated her as a child of the family in relation to his marriage to Pauline (as well as treating her as his own natural child).

CONCLUSIONS

62. The cessation of a claim under the 1975 Act on the death of the claimant or would-be claimant prior to judgment appears to be settled, at least at first instance: any

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

person who wanted to pursue such a claim would need to be prepared to go at least as far as the Court of Appeal.

63. Whether it is possible for a claimant to establish that their own natural parent treated them as a child of a quite different family/marriage to that of which they are a product remains to be determined, although as such burden arises only on a claim under s.2(1)(f) of the 1975 Act, which claims are rare, it may be some time before this question is considered judicially.




mbaxter@5sblaw.com

©Mark Koshy-Baxter 2017

**FIVE
STONE
BUILDINGS**

**TESTAMENTARY FREEDOM
FROM A COMPARATIVE
PROSPECTIVE**



Dr Brian Sloan

<p> UNIVERSITY OF CAMBRIDGE</p> <p> Robinson College University of Cambridge</p> <p>Testamentary Freedom from a Comparative Perspective</p> <p>Dr Brian Sloan Fellow & College Lecturer in Law, Robinson College, Cambridge</p> <p>5 Stone Buildings "Ilott and Beyond" Conference, 11th April 2017</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>I. Introduction</p> <p>II. Scotland: <i>Legitim</i></p> <p>III. Ireland: "moral duty to make proper provision"</p> <p>IV. Conclusion: Reflections on <i>Ilott</i></p> <p> UNIVERSITY OF CAMBRIDGE</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



*Ilott and Beyond: The Inheritance Act
in the Spotlight*

<p>II. Scotland: Legitim</p> <ul style="list-style-type: none"> • Succession (Scotland) Act 1964 preserves civilian-style legal rights to share in even testate estates: <ul style="list-style-type: none"> • Spouse/CP: 1/3 of net moveable estate if surviving issue; 1/2 otherwise • Issue: <i>legitim</i> – 1/3 of net moveable estate if surviving spouse/CP; 1/2 otherwise • Any testamentary disposition in favour of possessor of legal right presumptively deemed to be in satisfaction of that share: s 13, so must be election • Division of <i>legitim</i>: at level of issue where at least one survivor – divided equally between survivors plus issue (as a class) of any predeceasing person; then <i>per stirpes</i> <p>UNIVERSITY OF CAMBRIDGE</p>	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>II. Scotland: Legitim</p> <ul style="list-style-type: none"> • No testate legal rights in relation to immoveable property since 1964: s 10; Scots Law Commission in <i>Discussion Paper on Succession</i> (DP 136, 2007, http://bit.ly/2oiT3Oo) recognised as significant limitation & proposed removal • SLC recognised rigidity, taking no account of recipient's needs, resources or conduct; but also found that <i>legitim</i> rarely actually claimed, particularly where will beneficiary is own parent (<i>Report on Succession</i> (Scot Law Com No 215, 2009, http://bit.ly/2o8Xzqs)) • Ended up recommending two options for reform because opinion sharply divided <p>UNIVERSITY OF CAMBRIDGE</p>	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>



*Ilott and Beyond: The Inheritance Act
in the Spotlight*

<p>II. Scotland: Legitim</p> <ul style="list-style-type: none"> Options for reform of rights of issue: <ul style="list-style-type: none"> 25% of what would've received under reformed intestacy rules; if surviving spouse/CP no claim for estates below £300k & only small one for all but very largest estates Calculated sum for dependent children to whom deceased owed inter vivos maintenance obligations – can continue up to 25 for those in education – fully adult children could be disinherited altogether Not taken forward in Succession (Scotland) Act 2016 but significantly Commission rejected discretionary scheme – public supported that decision 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>II. Scotland: Legitim</p> <ul style="list-style-type: none"> D Reid, "Reform of the law of succession: inheritance rights of children" (2010) 14 Edinburgh LR 318, 319 criticises: <p><i>...the Commission's antagonistic treatment of children's rights on the grounds that its underlying rationale is out of step with public attitudes towards inheritance (the fact that most parents want their children to inherit), with the reality of family life and its complex web of intergenerational dependence, and with social policy objectives on all sides of the political spectrum.</i></p> 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



*Ilott and Beyond: The Inheritance Act
in the Spotlight*

<p>III. Ireland: “moral duty to make proper provision”</p> <ul style="list-style-type: none"> • Succession Act 1965 unusually mixes legal right of spouse (CP now prospectively abolished) & discretionary provision for children • Spouse: ½ of estate if leaves no children; 1/3 if leaves children (s 111); election (s 115) <p> UNIVERSITY OF CAMBRIDGE</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>III. Ireland: “moral duty to make proper provision”</p> <ul style="list-style-type: none"> • Child (s 117 – doesn't apply on full intestacy) – “halfway house”: <p><i>(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just...</i></p> <p><i>(2) The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.</i></p> <p> UNIVERSITY OF CAMBRIDGE</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

<p>III. Ireland: “moral duty to make proper provision”</p> <ul style="list-style-type: none"> • Order under s 117 can't affect legal right of spouse, or entitlement under will if that spouse is parent of applicant • NB express reference to testator's conduct & "moral duty" – both of which might reflect differences to English approach • B Sloan, 'Testamentary Freedom and Caring Adult Offspring in England & Wales and Ireland' in K Boele-Woelki, J Miles & JM Scherpe (eds), <i>The Future of Family Property in Europe: Proceedings of the 4th Conference of the Commission on European Family Law</i> (Intersentia, Cambridge, 2011, http://bit.ly/1r3Qhdk), 263: <p><i>In re GM</i> [(1972) 106 ILTR 82, 86]. <i>Kenny J emphasised that the Irish Act was not based on a duty to provide maintenance, and went as far as to say that authorities from New Zealand, New South Wales and England were of 'little assistance' when making decisions under [it]...however, the needs of the applicant are often central to such determinations.</i></p> 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>III. Ireland: “moral duty to make proper provision”</p> <ul style="list-style-type: none"> • Important principles from <i>XC v RT</i> [2003] IEHC 6 – some of which reflect a conservative view of the family & a relatively limited view of testamentary freedom – eg “The duty under s. 117 is not to make adequate provision but to provide proper provision in accordance with the testator's means” • Interesting case: <i>EB v SS</i> [1998] IESC 68 <ul style="list-style-type: none"> • Mother's net estate: IR£302.5k; legacies to grandchildren; residue to charities • Claimant 40 – previous drug & alcohol problem; lived on benefits with wife & 3 children in house provided by father; had returned to university at father's expense • Mother made inter vivos provision of £275,000; claimant “unhappily dissipated” • Claim failed; some similarities with <i>Ilott</i> but NB inter vivos provision from parents 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>

*Ilott and Beyond: The Inheritance Act
in the Spotlight*

<p>III. Ireland: “moral duty to make proper provision”</p> <ul style="list-style-type: none"> • Irish Law Reform Commission published <i>Issues Paper: Section 117 of the Succession Act 1965</i> (IP 9, 2016, http://bit.ly/2oSV8yi) – seeking views on reform in light of: <ul style="list-style-type: none"> • More complex family patterns – divorce impossible when 1965 Act was passed! • Changing demographics – idea of “adapted generational contract”; some parents will help adult children before death, others will need their assets to survive & pay for care – “moral duty” might be out of place <p> UNIVERSITY OF CAMBRIDGE</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>IV. Conclusion: Reflections on <i>Ilott</i></p> <ul style="list-style-type: none"> • Heather Ilott may have done better in Scotland, though would depend on types of property within the estate – told that “largest single component” was house • Telling that Irish Law Reform Commission described <i>Court of Appeal’s</i> order in <i>Ilott</i> as “relatively conservative” (<i>Issues Paper</i>, [23]) and reflecting a “relatively narrow ‘maintenance’ approach” ([1.65])! But estrangement impact seems unclear • New Zealand would probably also have been more generous – test of “proper maintenance and support” in Family Protection Act 1955 – Law Commission recommended reform but not taken up • I’ve argued for increased recognition of positive caring contributions (<i>Informal Carers and Private Law</i> (Hart, 2013, http://bit.ly/2hBGVWJ), esp ch 5, so maybe limited/no provision on estrangement is the other side of that coin • Agree with Lady Hale’s suggestion that principles should be reviewed – eg need to establish relationship with benefits system <p> UNIVERSITY OF CAMBRIDGE</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

FIVE
STONE
BUILDINGS

The decisions in *Williams v
Martin* [2017] EWHC 491
(Ch) and *Lewis v Warner*
[2016] EWHC 1787 (Ch)
regarding cohabittees

William East

FIVE
STONE
BUILDINGS

The decisions in *Williams v Martin*[2017]
EWHC 491 (Ch) and *Lewis v Warner*
[2016] EWHC 1787 (Ch) regarding
cohabitees

William East
5 Stone Buildings
11 April 2017

www.5sblaw.com

Williams v Martin: facts



- Claimant (Mrs Williams) – cohabitant with deceased
- Defendant (Mrs Martin) – deceased’s wife (deceased separated 1994 and moved in with claimant)
- 2009 – claimant and deceased buy house (as 50-50 tenants in common) (‘20 Coburg Road’)
- Deceased died June 2014, in relationship but still married to defendant

<p>Devolution of estate</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none">• Will left estate to Mrs Martin, wife• Estate consisted of 50% share in 20 Coburg Road (£160,000), £20,000 and small share in another property• Mrs Martin took FMH and bank accounts worth £169,928 by survivorship	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>Decision at trial</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none">• Trial at Central London County Court before HHJ Gerald• Found that Mrs Williams eligible to bring claim as cohabitant, alternatively eligible on basis that was maintained by deceased• Award: beneficial interest in 20 Coburg Road should be passed to Mrs Williams	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>

<p>Grounds of appeal</p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ol style="list-style-type: none"> (1) Against finding of eligibility – rejected at permission stage but Mrs Martin allowed to pursue appeal against finding that Mrs Williams maintained by deceased so far as relevant to case otherwise. (2) Conclusions reached by judge as to financial needs of Mrs W unsupported by any proper evidence/ contradicted by Mrs W's own evidence (3) Judge wrongly disregarded Mrs W's interest in another property, 60 Slade Road, as asset available to meet her needs (4) Judge wrongly dismissed evidence of Mrs M as to her needs when it was not challenged in cross examination (5) Relief substantially in excess of what necessary to meet needs 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Standard of review on appeal</p> <p style="text-align: right;">FIVE STONE BUILDINGS</p> <ol style="list-style-type: none"> (1) Appeal heard by Marcus Smith J (2) Emphasised standard of review, quoting <i>Ilott</i>: <p>“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.”</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>Grounds 1 and 2: Claimant’s financial needs and resources</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Judge found that Mrs W’s contribution to joint expenditure was £2,000 pcm, as opposed to £7,000 from the deceased • Mrs M said that judge had inappropriately relied on schedules produced by Mrs W’s counsel at trial • Rejected – appeal court found judge had criticised both sets of schedules, was entitled to infer on the facts that there were unequal contributions to household expenditure • In light of this, also not possible to challenge finding that Mrs W left poorer and had to reduce expenditure after deceased’s death • Challenges against finding that Mrs W maintained by deceased, had significant financial needs therefore rejected (Grounds 1 and 2) 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>Ground 3: decision to disregard 60 Slade Road</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • 60 Slade Road was a three bedroom house in Bristol, in which Mrs W held a 50% interest of £135,000. She and her sister inherited half shares each in 2008 from their father. • Sister lived in property – evidence was that she was of very limited resources and could not afford to pay rent. Mrs W reluctant to evict her. • Judge held that property interest should be left out of account on grounds of human cost of Mrs W enforcing her strict legal rights against her sister. 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>

<p>Ground 3: decision to disregard 60 Slade Road (successful)</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none">• Appeal court:<ul style="list-style-type: none">– Court had discretion to leave even a significant property interest out of account– However, not right to in this case:<ul style="list-style-type: none">• Material asset in which Mrs W had an immediate interest of £135k• Partly disregarded on basis that Mrs W said had taken legal advice which said it would be difficult for her to realise the asset, but in fact had not taken any. If necessary, Mrs W could realise asset• Accepted in cross examination that sister could easily downsize• No consideration given as to whether could realise value of interest without requiring sister to move	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Ground 4: Mrs M's financial needs and resources (successful)</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none">• Criticism – evidence of Mrs M re her financial needs wrongly dismissed by judge when not challenged in cross examination• Mrs M said had monthly shortfall of £1,500 plus assets of only £44,000• But judge found, e.g. 'it is quite possible that there are additional means not revealed to the court'.• Appeal court – approach unprincipled and wrong• Too much emphasis on open offer made by Mrs M that Mrs W could have a life interest in 20 Coburg Road	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>Ground 5: relief excessive (successful)</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Appeal court held that it followed from fact that judge wrongly understated Mrs W’s financial position and overstated that of Mrs M that relief granted was excessive • Judge had failed to apply proper test for reasonable financial provision at crucial part of judgment. Should have held in mind concept of freedom of testamentary disposition, limited standard of provision for cohabittees, case law re meaning of maintenance. • Judge did not place enough emphasis on Mrs M’s rights as spouse 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>Re-exercising the discretion</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Appeal court took view that will did not make reasonable financial provision given length of relationship and fact that gave nothing to Mrs W, who had housing needs • However, life interest only: <ul style="list-style-type: none"> – 60 Slade Road was an asset which could be drawn upon by Mrs W and the difference between her income and expenditure as capitalised (£59k) could be more than met by realising her interest (worth £135k) – Possible for Mrs W to reach solution with sister which would enable sister’s housing needs to be met – Grant of whole asset excessive to meet housing needs – Right for Mrs M to retain reversion in circs in which £50,000 of the costs of purchase came out of joint account belonging to her and deceased – Not unworkable to have life interest arrangement – perhaps optimistic! 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>

<p>Lewis v Warner [2016] EWHC 1787 (Ch)</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Another appeal, case about what is meant under 1975 Act re reasonable financial provision for a person’s maintenance • Held that granting an option to purchase property for full value was within the scope of what constituted maintenance 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>Lewis v Warner: facts</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Deceased – Audrey • Claimant – Lynn, Audrey’s only child and beneficiary under will • Defendant – Stanley – partner of Audrey • Lynn brings claim for possession of residential property (Green Avon) within estate • Stanley brings cross claim for relief under 1975 Act 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>

<p>Lewis v Warner: facts (cont.)</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none">• Stanley lived together with Audrey for 20 years as partner. Aged 91 by time of trial. Eligible as a cohabitant• Admitted that would have been surprised if Audrey had made will in his favour• No understanding that would be able to stay in the house or be able to purchase it, signed declarations saying would not make claim on house• Admitted significantly better off than deceased, had means to buy house or alternative accommodation• Had lived in village where house was for whole life, lived next door to supportive neighbours including one who was a doctor• House had value of £385k	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Lewis v Warner: parties' positions</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none">• Lynn's position: wanted house to go on open market, willing to sell to Stanley if he was the highest bidder• Stanley's position: said would be very unhappy and stressed if had to move from house where had spent happiest 20 years of his life.• Stanley: should be able to purchase property for full value	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>Lewis v Warner: first instance decision</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Decision of Recorder Gardner QC in County Court at Gloucester and Cheltenham • Stanley should be given option to have Green Avon transferred to him for full market value of £385k, Lynn ordered to pay costs • Matter appealed to Newey J (High Court) 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>Appeal: relevant law considered</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Points made by Newey J: <ul style="list-style-type: none"> – Act does not define ‘maintenance’ – Had been held in <i>Re Coventry</i> that ‘one must not put too limited a meaning on it’ but held that does not mean just enough to enable a person to get by, nor does it mean anything which may be regarded as reasonable or desirable for claimant’s general benefit or welfare – Question not whether reasonable for deceased to assist, but whether unreasonable that effective provisions governing estate do not do so – In <i>Re Dennis</i>, held that ‘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’ 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>

<p>Reasoning of lower court</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none">• Unable to see why maintenance of roof over head not within definition of maintenance – provision had financial value because without it applicant would have had to rent or buy an alternative roof• Physical disabilities of Stanley, his age, length of time house had been his home, fact made contributions to cost of home, fact that house in village where had lived whole life and next to neighbours who looked after him - all favoured him being able to remain there• However, unreasonable for beneficiary to have to wait until Stanley's demise before realising value - so option granted	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Grounds of appeal</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none">• Although judge directed himself correctly re law applicable under the act, failed to apply it in accordance with judicial guidance or the facts, and so came to utterly wrong conclusions ('utterly wrong conclusions point')• Exceeded powers by making order which had no power to make ('no power point')	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>Wrong conclusions point: more detail</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none">• Argument – because 1975 Act deals with ‘reasonable financial provision’, imposes a requirement to satisfy court that had financial needs which were not met by the will• Stanley did not have such financial needs – had enough money to purchase alternative accommodation. Saying that did not wish to move owing to stress and upset of doing so not enough.• Appeal court acknowledged case raised a point of law re whether provision for maintenance must be at less than market value	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>No power point: more detail</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none">• Argument: court cannot use powers under section 2 of the 1975 Act to order estate assets to be transferred at full market value	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>View of appeal court: appeal dismissed</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Financial provision for applicant’s maintenance would in overwhelming majority of cases involve transfer of value from estate to applicant • If maintenance allowed person to discharge cost of daily living, arrangement allowing a person to remain in a property on market terms not obviously of that kind • However, courts had shied away from precise definition of word ‘maintenance’, and it could exceptionally encompass an arrangement for full consideration 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p>View of appeal court (cont.)</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none"> • Maintenance capable of referring to other forms of assistance with requirements of daily life – person could be in need of financial provision without being in any way short of money – money may not be able to secure the provision he required. This was the case with Stanley • Although appellant criticised decision of judge in circumstances in which Stanley able to finance alternative accommodation plus his acceptance that no agreement he should be able to stay there, decision of judge was a value judgment which it was difficult to appeal 	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>

*Hott and Beyond: The Inheritance Act
in the Spotlight*

<p>Onwards to the Court of Appeal</p> <p>FIVE STONE BUILDINGS</p> <ul style="list-style-type: none">• Case now on appeal to the Court of Appeal – permission given by Floyd LJ• No hearing date yet set• Likely consideration of decision in light of <i>Hott</i> – para [14] accepts that the concept of maintenance is ‘no doubt broad’, but goes on to say that ‘it must import provision to meet the everyday expenses of living’.• Will be an important authority on the scope of maintenance under the Act.	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
--	---

weast@5sblaw.com
© William East 2017