Case No: B4/2010/2131/FAFMF

Neutral Citation Number: [2011] EWCA Civ 346

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, FAMILY DIVISION
MRS JUSTICE ELEANOR KING
Lower Court No: FDF00810

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2011

Before:

THE PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE ARDEN
and
LADY JUSTICE BLACK

- -

Between :

Heather Ilott	**Appellant**
- and -	
David Mitson	**1st Respondent**
Michael Land	**2nd Respondent**
The Blue Cross	**3rd Respondent**
Royal Society for the Protection of Birds	**4th Respondent**
Royal Society for the Prevention of Cruelty to Animals	**5th Respondent**

- -
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John M Collins (who appeared **pro bono**) for the Appellant
Giles Harrap (instructed by **Wilsons Solicitors LLP**) for the 3rd, 4th and 5th Respondents

Hearing dates: 8 February 2011

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Judgment

Sir Nicholas Wall P :

Introduction

1. Melita Jackson (the deceased) died on 10 July 2004 at the age of 70, leaving a net estate of some £486,000. After some pecuniary legacies (which are not material for the purposes of this appeal) she left the entirety of her residuary estate to the Blue Cross Animal Welfare Society, the Royal Society for the Protection of Birds and the Royal Society for the Protection of Cruelty to Animals (the charities). There is no evidence that the deceased had any connection with the charities, or that, during her lifetime, she had any particular love of, or interest in, either animals or birds.

2. The deceased's will, which is dated 16 April 2003 makes no provision for the appellant, who is now aged 50, and who is the deceased's only child, albeit estranged from the deceased at the date of the latter's death. The appellant is a married woman with five children, and lives in modest circumstances. The deceased was a widow whose husband (the appellant's father) had died in an industrial accident in 1960, whilst the deceased was pregnant with the appellant.

3. The appellant took proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 (the Act). Her application came before a district judge sitting in the Principal Registry of the Family Division (DJ Million (as he then was)). In a reserved judgment dated 7 August 2007 after a two day hearing (at which the appellant gave evidence) the district judge held pursuant to section 1 of the Act, that "the disposition of the deceased's estate effected by (her) will…..(was) not such as to make reasonable financial provision" for the appellant, and awarded her a lump sum of £50,000, representing a capitalisation of the sum which the district judge found it would be "reasonable in all the circumstances of the case" for the appellant (as an adult child of the deceased) to receive for her maintenance – see section 1(1)(c) and 1(3) of the Act.

4. No point in this appeal is taken by the charities on the fact that the district judge awarded a lump sum by way of capitalisation of maintenance: indeed this was the provision which he was invited to make, if – as proved to be the case - he was against the charities' submission that the appellant's claim should be dismissed.

5. The appellant appealed against the quantum of the district judge's order, and the charities (who up until that point had taken a pragmatic view of the district judge's judgment) thereupon cross-appealed. They did so on the ground that the district judge had failed properly to apply the law, and that had he done so, he would have concluded that the absence of any provision for the appellant in the will was reasonable. They argued, accordingly, that the appellant's claim should be dismissed.

6. After a considerable delay, the appeal and cross-appeal came before Eleanor King J on 9 October 2009. In a reserved judgment ([2009] EWHC 3114 (Fam); also reported at [2010] 1 FLR 1613) and handed down on 1 December 2009, the judge allowed the charities' cross-appeal and dismissed the appellant's claim. In summary, the judge found both (1) that the district judge had erred in law and also (2) that he had erred in balancing the various factors under section 3 of the Act. He had thus been "plainly wrong" to conclude that the deceased had failed to make reasonable financial provision for the appellant.

7. It is against this order that the appellant appeals. On the appeal, she was represented ***pro bono*** by Mr. John Collins of counsel. The executors, who are neutral in the proceedings, were, sensibly, not represented. The charities were represented by Mr. Giles Harrap of counsel. I am grateful to both counsel for their full and careful arguments.

8. It was not, however, until midway through Mr. Collins' argument that I realised fully the relief which he was seeking. He invited this court (1) to allow the appeal against the dismissal of the appellant's application under the Act, but also (2) to remit her appeal against the quantum of the district judge's order to a judge of the Division other than Eleanor King J for determination.. His case, in essence, was that due to the course taken by the judge, the appellant's appeal on quantum had never been heard.

9. Without prejudice to his submission that we should dismiss the appeal, Mr. Harrap did not dissent from such a course, in the event that we were to allow the appeal. However, in my judgment it follows that if we were to allow the appeal, we are not concerned with the question of quantum or the manner in which the district judge exercised his discretion to award the appellant £50,000 from the deceased's estate. This in turn means, in my judgment; (1) that provided this court is satisfied that the district judge was right not to dismiss the appellant's claim, nothing need to said about quantum; and (2) that this court can deal with the appeal on pure points of law. We were fortunate in that counsel cited to us all the relevant authorities and this, I think, enables this court to conduct a thorough review of the approach to be taken in adult children's claims under the Act.

10. This is, of course, a second appeal. However, permission for it has been given by Wilson LJ at an oral hearing on 18 November 2010. The learned Lord Justice also extended the appellant's time for filing her appellant's notice. I can, accordingly, proceed directly to the points of law raised by the appeal.

The issues raised by the appeal .

11. In my judgment, the appeal raises a number of important questions. The first relates to the role of a judge exercising an appellate jurisdiction (as Eleanor King J was) as opposed to a first instance jurisdiction. More profoundly, however, the case raises in stark form the approach which falls to be adopted when an adult child seeks to claim against the estate of a deceased parent, and, as I have already indicated, it is on this aspect of the case that I propose to concentrate.

12. Although their terms are familiar, I think it necessary to set out the relevant sections of the Act. As applied to the instant case, therefore, they are as follows: -

> 1. **Application for financial provision from deceased's estate**
>
> (1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons -
>
> ……..
>
> (c) a child of the deceased;
>
> …….

that person may apply for an order under section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will……is not such as to make reasonable financial provision for the applicant…….

(2) In this Act "reasonable financial provision" –

…..

(b) ……. means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance……

13. Nothing turns on section 2 of the Act, which empowers the court to make a lump sum payment out of the estate. The following parts of section 3 are, however, important: -

Matters to which the court is to have regard in exercising powers under Section 2

(1) Where an application is made for an order under section 2 of this Act, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say—

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;

(b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;

(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

(d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;

(e) the size and nature of the net estate of the deceased;

(f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;

(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant…….

14. In relation to any application made by a child of the deceased, section 3(3) requires the court (without prejudice to the generality of section 3(1) (g) and in addition to the matters listed in paragraph (a) to (f)) to have regard to the manner in which the applicant was being or in which he might expect to be educated or trained. Given the appellant's age, nothing turns on this sub-section, it being well established that a court has jurisdiction to entertain a claim by an adult child. Equally, although the

applicant's current income is largely made up of benefits and tax credits, I do not base my decision on the ground that a claim under the Act can properly be used to relieve the State of the obligation to support an applicant.

15. Sections 3(5) and (6) require the court to take into account "facts as known to the court at the date of the hearing" (section 3(5)): "resources" includes earning capacity: in considering financial needs, the court has to take into account financial obligations and responsibilities (section 3(6)).

Authority

16. The first and most frequently cited case on the subject is the decision of this court in ***Re Coventry (deceased)*** [1984] 1 Ch. 461 (***Re Coventry***), upholding the first instance decision of Oliver J. In my judgment, this case bears careful examination both for what it says and, as importantly, for what it is believed to say, but does in fact not say.

17. The first point to note about ***Re Coventry*** is that it was a strong case on its facts. The plaintiff was the deceased's adult son. The sole beneficiary under the intestacy rules was the plaintiff's mother, the intestate's widow. The estate was modest, and consisted substantially of the intestate's interest in the dwelling house in which he had been living with the plaintiff at the date of his death, and in which his widow had been found to have a one third interest. The judge took the disposable balance of the estate to be £7,000, of which the Master had awarded £2,000 to the plaintiff. The judge expressed "some surprise" (which he then directed himself to contain) that the matter had been referred to him by the plaintiff, who did not think £2,000 enough.

18. The deceased's widow was 74. She was living on an old age pension and supplementary benefit. The plaintiff, who was also in modest circumstances, was 46, in good health, and was, or was certainly capable of being, in full time employment. Against this background, Oliver J questioned whether this was the sort of case in which it was the intention of Parliament that the court should interfere to upset the dispositions which the legislature had made on the deceased's behalf ([1980] 1 Ch. 461 at 468D) and decided that it was not. He dismissed the summons and the plaintiff appealed to this court, which dismissed his appeal.

19. It is, as I have already indicated, important to note both what was said and what was not said in ***Re Coventry***. It is equally important, in my judgment, to resist the temptation to impose judicial glosses onto the statute.

20. Having recited the relevant terms of the statute, Oliver J said (and was expressly upheld in this court for so saying ([1980] 1 Ch 461 at 469G): -

> "So these matters [the statutory criteria] have to be considered at two stages – first in determining the reasonableness of such provision (if any) as has been made by the deceased for the plaintiff's maintenance and, secondly, in determining the extent to which the court should exercise its powers under the Act if, but only if, it is satisfied that reasonable provision for the plaintiff's maintenance has not been made.' "

21. In a frequently cited passage, Oliver J went on to say (ibid at 474F-G to 475G): -

“It seems to me, however, that in regarding the circumstances and in applying the guide lines set out in section 3, it always has to be borne in mind that the Act, so far as it relates to applicants other than spouses, is an Act whose purpose is limited to the provision of reasonable maintenance. It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. Subject to the court’s powers under the Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession. In order to enable the court to interfere with and reform those dispositions it must, in my judgment, be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant – and that means, in the case of an applicant other than a spouse for that applicant’s maintenance. It clearly cannot be enough to say that the circumstances are such that if the deceased had made a particular provision for the applicant, that would not have been an unreasonable thing for him to do and therefore it now ought to be done. The court has no carte blanche to reform the deceased’s dispositions or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the deceased’s position. This may seem almost a truism, but I mention it because some of counsel's submissions for the plaintiff, although he did not put it so in terms, seemed to me to be leading to the conclusion that because the deceased's intestacy and the inflation of property values had produced something of a windfall, which could reasonably have been disposed of by the deceased in favour of his son if he had thought about it, therefore the court ought to step in and divert it to where it would be most useful and appreciated.

That is not the purpose of this legislation at all. It cannot be enough to say, 'Here is a son of the deceased, he is in necessitous circumstances, there is property of the deceased which could be made available to assist him but which is not available if the deceased's dispositions stand; therefore those dispositions do not make reasonable provision for the applicant'. There must, as it seems to me, be established some sort of moral claim by the applicant to be maintained by the deceased or at the expense of his estate beyond the mere fact of a blood relationship, some reason why it can be said that, in the circumstances, it is unreasonable that no or no greater provision was in fact made. This was the approach under the former legislation and it is reflected in the passage from the judgment of Buckley J in *Re Ducksbury (deceased)* ([1966] 2 All ER 374 at 380, [1966] 1 WLR 1226 at 1233) to which I

have already referred, where, towards the end of his judgment, he says:

> … it is not for me to try to effect the sort of testamentary dispositions which I think that a testator should have made or would have made had his mind not been affected, as I think it was, by his matrimonial disputes with his first wife. It is not for me to say what he ought to have done if he had been generously disposed towards the plaintiff. I have to consider what it is reasonable in the circumstances of this case to order that she should receive, having first of all satisfied myself that the testator had failed to make reasonable provision for her. He has in fact made no provision for her, and for the reasons that I have indicated I think that he was under a moral obligation to make some provision for her. I am, therefore, satisfied that he has failed to make a reasonable provision for her."

22. Having acknowledged that, if he looked alone at the plaintiff's financial resources, that did not demonstrate "a state of affluence", Oliver J concluded (ibid at 478C-D): -

> "In my judgment the plaintiff's claim substantially rests on two limbs only, that is to say (a) that he is a son of the deceased with whom it might be thought that there would be a bond of natural affection and (b) that although he is in employment and capable of maintaining himself his circumstances leave him little or no margin for expenditure on anything other than the necessities of life. I have every sympathy for any plaintiff who, on relatively slender earnings, has to meet a steadily rising cost of living, but, as I have said, I cannot regard the Act as one which entitles the court to interfere with a deceased person's dispositions simply because a qualified plaintiff feels in need of financial assistance. I cannot in this case find any circumstances which satisfy me that it is an unreasonable result of the intestacy laws that no provision is made for the plaintiff's maintenance and in my judgment the application must fail."

23. Oliver J's decision was upheld in this court, and ***Re Coventry*** both at first instance and in this court remains good law. It is, however, to be observed that one of the arguments advanced on behalf of the appellant in ***Re Coventry*** was that the judge had made a "moral obligation" a pre-condition to a successful application under the Act by an adult child (ibid, p 479G-H). Goff LJ, giving the leading judgment in this court, rejected that criticism "at once". At [1980] 1 Ch 459 at 487G he said:

> "I reject the second of those criticisms at once. Oliver J nowhere said that a moral obligation was a prerequisite of an application under s 1(1)(c); nor did he mean any such thing. It is true that he said a moral obligation was required, but in my

view that was on the facts of this particular case, because he found nothing else sufficient to produce unreasonableness ”

24. Buckley LJ expressed the same opinion: - see pp 494H-495A. Geoffrey Lane LJ went further, He divided the preliminary stages into three and said: - (492D-G): -

> “I agree. The questions to be answered by Oliver J. were these: first of all, did the statutory provisions relating to intestacy operate in this particular case so as not to make reasonable financial provision for the plaintiff son; secondly, if they did so operate - that is to say, if there was no reasonable provision - should the court exercise in its discretion its power to order some provision to be made; and thirdly, if so, in what manner should that provision be ordered?
>
> Since the plaintiff received nothing from the estate on his father's death intestate, in effect the first question becomes this: Was it reasonable in all the circumstances that the plaintiff should receive no provision from his father's estate?
>
> The judge reserved his judgment. The result was a meticulous and painstaking examination of all the relevant facts of the case, and a conclusion that in the circumstances the contentions on behalf of the plaintiff must fail; that it was reasonable for this plaintiff to receive nothing and for the mother, who is the widow defendant, to receive whatever was left after all this litigation had been paid for.
>
> Now whatever the rights and wrongs of this matter may be, it seems to me that this was par excellence a case in which the decision of the judge should stand as to what is reasonable and what is not reasonable, unless it is clearly shown that he has gone wrong on a point of law, or in some way has misapplied the facts of the case to the law. Particularly in the case of small estates such as this one, appeals like this to this court are strongly to be discouraged. It has been said before, in particular in the passage to which our attention has been drawn, by Fenton Atkinson LJ in ***Re Gregory (Deceased), Gregory v Goodenough*** [1970] 1 WLR 1455, 1462.”

25. In my judgment it follows from ***Re Coventry*** that the first stage – whether one regards it as one stage or two - is a “value judgment” or “qualitative decision” (per Goff LJ at 487A-B) and Geoffrey Lane LJ at 492-4) as to whether or not the deceased’s dispositions make reasonable financial provision for the plaintiff under the Act. This is very much a matter for the first instance tribunal and, as Goff LJ says “ought not to be interfered with by us unless we are satisfied that it was plainly wrong.”

26. What of the law since ***Re Coventry***? We were, initially, spared ***Re Jennings (deceased)*** [1994] Ch 286, no doubt to spare my blushes, since my decision in that case was reversed by this court. In the present context, however, I find the case helpful for two reasons. Firstly, it confirms the proposition that Oliver J was not erecting a moral obligation as a precondition to success for an application by an adult child under the Act – see in particular, the judgment of Nourse LJ at page 295 E to F. Secondly, on the facts, it is an example of a case where the applicant for relief plainly did not require maintenance. He was in moderately affluent circumstances, and whilst, no doubt, it would have been beneficial for him to have had a lump sum to reduce or eliminate his mortgage, he did not need such a sum, and could manage perfectly well without it.

27. We were also referred to the decisions of this court in Cameron ***v Treasury Solicitor*** [1996] 2 FLR 716 and ***Re Hancock (deceased***) [1998] 2 FLR 346. The latter was a claim by an adult daughter which succeeded largely because of the increase in the value of the land passing under the testator's will between its date and the hearing. However, the case is of value for my purposes since it reinforces the two propositions; (1) that an adult son or daughter of the deceased does not have to show that the deceased owed him or her a moral obligation or that there were other special circumstances in order to succeed under the Act; and (2) that in deciding whether the disposition of the deceased's estate makes reasonable provision for the applicant, the trial judge is not exercising a discretion but making a value judgment based on his or her assessment of the factors contained in section 3(1) of the Act. Butler-Sloss encapsulated the first point neatly, in my judgment, when she said: -

> "I do not, for my part, extract from the decisions in ***Re Coventry*** and ***Re Jennings***, the degree of support for the defendants' case that Mr Crawford has submitted. It is clear to me that the 1975 Act does not require, in an application under s 1(1)(c), that an adult child (whether son or daughter) has in all cases to show moral obligation or other special circumstance. But on facts similar to those in ***Re Coventry*** and even more so with the comparatively affluent applicant in ***Re Jennings***, if the facts disclose that the adult child is in employment, with an earning capacity for the foreseeable future, it is unlikely he will succeed in his application without some special circumstance such as a moral obligation. The judge expressly found that there was no moral obligation or responsibility to be found in this case."

28. Judge LJ (as he then was) said in the same case:-

> "The decision in ***Re Coventry*** was considered in ***Re Jennings***, ***deceased,*** [1994] Ch 286, where Nourse LJ concluded that in the case of an application by an adult son of the deceased who was fit and able to work, and in work, some 'special circumstance, typically a moral obligation' was required. The application 'failed because the deceased owed him no moral or other obligation and no other special circumstance was shown'. The use of the word 'typically' is revealing. Nourse LJ did not say 'invariably' or 'necessarily'. If he had done so he would

have been using language which does not appear among the statutory criteria. Accordingly, while accepting that a claim by an adult with an established earning capacity may very well fail if a moral claim or special circumstance cannot be established, in an appropriate case the court is entitled to conclude that the claim should succeed notwithstanding their absence."

29. Finally, Sir John Knox, commenting upon the decision of Oliver J in ***Re Coventry*** said: - ,

> "That approach was upheld by this court but, as has been pointed out in both the judgments of Butler-Sloss and Judge LJJ, the argument that Oliver J had made a moral obligation on the deceased a prerequisite of a successful application was rejected. Oliver J did hold that in the circumstances which existed in ***Re Coventry*** a factor in addition to the plaintiff's blood relationship and necessitous state was needed for the scales to tip in his favour. The reference in the passage I have quoted to the need for a moral claim is not the same as a finding that the scales could only tip in the plaintiff's favour if it could be shown that the deceased was under a moral obligation to provide for the plaintiff. Mr Grant Crawford's argument that an adult child cannot make a successful application, unless he or she can establish a moral obligation by the deceased or some other special reason to show that there was a failure to make reasonable provision, is only correct to the extent that it means that there must be some reason for the court to decide that the scales fall in favour of the conclusion that there has been a failure to make reasonable financial provision. So limited, the submission is a truism which does not advance the argument. What is not permissible is to use ***Re Coventry***, or indeed any other authority, to establish that any particular factor has to be placed on one side or the other of the scales. Of course there has to be a reason justifying a court's conclusion that there has been a failure to make reasonable financial provision but the use of the phrase 'special circumstance' does not advance the argument. The word 'special' means no more than what is needed to overcome the factors in the opposite scale.
>
> ***Re Coventry***, besides providing a vivid illustration of the weight, as a factor in one scale, of the ability of an applicant who is capable of earning and does earn his or her living, is authority, particularly in the Court of Appeal decision, that there is no single essential factor for the success or failure of an application under the Act. Ewbank J made this clear in ***Re Debenham (Deceased)*** [1986] 1 FLR 404 when he said at 410C:

> "It is also said on behalf of the charities that before I can make an order I will have to find that there were special circumstances outside the range of circumstances listed in s 3 of the Act. It is said that this can be derived from the case of ***Re Coventry*** (above) but I do not read the case of ***Coventry*** in that light. That was relating to a grown-up man who was capable of working, and a judge, with whom the Court of Appeal agreed, said that if a grown-up man capable of working was going to make an application under the Act he would look for special circumstances. So one would. But that is not a question of law; it is a question of applying common-sense principles.'

30. We were also referred to the decision of the House of Lords in ***Piglowska v Piglowski*** [1989] 1 WLR 1360, to the decision of this court in ***Re Pearce (deceased)*** [1998] 2 FLR 705 and to the decision of Munby J (as he then was) ***In the estate of Geoffrey Holt Myers (deceased). Myers v Myers*** [2008] WILR 851. However, the case which, speaking for myself, I have found of greatest assistance, is the decision of this court in ***Espinosa v Bourke*** [1999] 1 FLR 74, in which the leading judgment was, once again, given by Butler-Sloss LJ.

31. ***Espinosa v Bourke*** was, like the instant case, a claim by an adult daughter who had been expressly excluded by the deceased from a share in his estate. The judge, Johnson J., dismissed the application, holding that whilst the deceased did have a moral obligation to the applicant, based both on a promise by the deceased to leave shares previously belonging to his wife to the daughter, and on the daughter's care for the deceased during his lifetime, that moral obligation had been discharged by the deceased's financial support for the daughter during his lifetime. The judge's decision was reversed by his court.

32. Butler-Sloss LJ summarised the respective arguments in the following way: -

> "Mr Norris QC for the appellant submitted that the judge fell into error in his approach to the claim. He concentrated on the issue of moral obligation and did not consider the criteria under s 3(1) as a whole. Mr Norris submitted that the most significant factor for the court to take into account was the applicant's needs and resources and the judge failed, despite the evidence before him, to make any findings at all about the financial position of the appellant: s 3(1)(a). An adult child was in no special position and this appellant was, at the time of death, dependent upon the deceased. At the time of the hearing her financial position was precarious. The judge, having found that a moral obligation existed, was in error in concluding that it had been discharged.
>
> Mr Herbert QC submitted that the judge had to make a value judgment and the appellate court should not interfere unless he was plainly wrong. A court should be reluctant to disturb a will. An adult child capable of earning a living had a big hurdle to overcome unless moral obligation or special

> circumstances could be established. He accepted that the judge did not make findings about the appellant's financial position but submitted that on the facts of this case it was not necessary to do so. In any event it must be inferred that the judge considered it was a case where the appellant had needs in order for him to go on and consider the moral obligation. The appellant had never provided evidence nor sought to ask for details of the portfolio shares inherited by the deceased from his wife and there was no evidence about it. At the time of the trial the appellant had bought a business and her present financial position was adequate. He submitted that the judge was entitled to come to the conclusion that the contribution made by the deceased during his lifetime together with the conduct of the appellant discharged any obligation he might have towards her."

33. After a thorough review of the Act and the relevant authorities, (including, of course, ***Re Coventry***) Butler-Sloss LJ quoted from her own judgment in ***Hancock***, before saying, at 755: -

> "I have drawn attention to the passages above from earlier decisions of this court in order to show the way in which the words 'moral obligation' and 'special circumstance' have been applied in the judgments. Subsection (1)(d) refers to 'any obligations and responsibilities'. Plainly those obligations and responsibilities extend beyond legal obligations and that is why, in my view, the word 'moral' has been used to underline and explain that the deceased's obligations and responsibilities are not to be narrowly construed as legal obligations but to be taken into account in a broad sense of obligation and responsibility. Any other meaning of 'moral' (such as the distinction between right and wrong, see *Concise Oxford Dictionary*) would more appropriately be considered under (g). There may have been some confusion in the minds of trial judges that the appellate court was placing a gloss upon the words of the section, and putting some special emphasis upon the requirements of subs (1)(d) so as to elevate moral obligation or special circumstance to some threshold requirement. From the judgments of this court in ***Re Coventry*** to the present day, it should be clear that no gloss has been put upon subs (1)(d). An adult child is, consequently, in no different position from any other applicant who has to prove his case. The court has to have regard to s 3(1)(a)–(g) and assess the relevance and the weight to be given to each factor in the list. If the applicant is of working age, with a job or capable of obtaining a job which would be available, the factors in favour of his claim for financial provision may not be of much weight in the scales. As Oliver J pointed out in ***Re Coventry***, necessitous circumstances cannot be in themselves

> the reason to alter the testator's dispositions. The passage from the judgment of Sir John Knox in *Re* ***Hancock*** (above) is, in my respectful view, particularly helpful to remind us of the right way to approach this class of case under the Act.
>
> Applying these propositions to the present appeal, in my judgment the judge did fall into error by focusing too much upon the requirement for an adult child to show a moral obligation. At the stage that he decided that the moral obligation had been discharged, he failed to put the other criteria, particularly needs and resources of the appellant, into the balancing exercise. In the light of the way in which the case was presented to him, I have some sympathy with the judge's approach to his decision. We were also told that it was an extempore judgment on the last day of his sitting in Manchester. Nonetheless his approach to the value judgment he had to make was flawed and his decision cannot stand."

34. ***Espinosa v Burke*** is also helpful for Butler-Sloss LJ's citation of and reliance upon the statement of Browne-Wilkinson J in ***Re Dennis (Deceased)***[1981] 2 All ER 140 at 145 on the subject of what is meant by maintenance: -It is now clearly established that claims under the Act by persons other than spouses are limited to maintenance …

> "The court has, up to 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 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 as appropriate as a maintenance payment; for example, to pay the debts of an applicant in order to enable him to continue to carry on a profit-making business or profession may well be for his maintenance."

35. In his judgment, Aldous LJ also reached the view that the judge had been "plainly wrong" in the value judgment which he had reached, and at page 760F-H, he said this:

> "Mr Herbert QC submitted that it was wrong to believe that the judge had not considered the needs of the appellant. This

> was a case where the appellant was an adult child capable of working. In those circumstances it was not reasonable to provide for maintenance absent a special circumstance such as a moral obligation. I accept that in certain circumstances the ability of an applicant to earn may mean that an application made under s 1 will fail unless special circumstances are shown. However, as stated by Oliver J in the ***Coventry*** case [1980] Ch 474 the case should not be approached upon a preconceived notion that there was a heavy burden on applicants of full age. In these days where persons without qualifications find it difficult to obtain employment, the court should not approach the question of what is the appropriate maintenance with any preconceived view. All the circumstances of the applicant must be considered."

The argument for the charities

36. For the charities, Mr. Harrap laid particular emphasis on the passage from the judgment of Oliver J in ***Re Coventry*** which I have set out ***in extenso*** at paragraph 22 above. He submitted that the instant case fell fair and square within ***Re Coventry.*** In summary, he submitted that what we had in the instant case was simply a moderately impecunious applicant and an estate which was plainly capable of providing her with maintenance - but nothing more. The law was that the deceased remained at liberty at her death to dispose of her own property in whatever way she pleased, and it could not be said to be an unreasonable result in the circumstances if that disposition made no provision for the appellant.

37. Furthermore, the judge had been right. She was both entitled and bound to allow the appeal from the district judge for reasons set out in her judgment. The District Judge had fallen into error by over-emphasising the deceased's subjective reasons for acting as she did rather than assessing the objective results of the disposition. As a consequence, as the judge found, he had asked himself the wrong question.

38. Even more importantly, and despite looking at each section 3 factor separately, the district judge had failed thereafter to stand back and assess their impact when taken together. Had the district judge carried out a proper balancing exercise, as the judge had done, he would have concluded that, far from any of the section 3 factors tipping the balance in favour of the daughter's claim, the court was left with a filial relationship and necessitous circumstances with nothing more of sufficient cogency to drive the court to the conclusion that in all the circumstances the lack of provision was unreasonable.

39. Mr. Harrap developed the argument by submitting that the stark facts of the instant case were that that the applicant was at trial before the district judge a 46 year old daughter suffering from neither physical nor mental incapacity of any kind who had made her life entirely independently of her mother for the 26 years prior to the latter's death. When she chose to marry, have children and not to work she did so without any involvement with the deceased such as could place any responsibility on the deceased or her estate to maintain her in life or on death. Indeed she did not ask the deceased to her wedding. The Claimant and her husband had managed their lives over

many years without any expectancy that she would receive anything. On proper analysis, there was simply nothing in the facts making it objectively unreasonable that the Claimant received nothing for her maintenance from the estate of her mother save the fact of her necessitous circumstances.

40. Mr. Harrap advanced other arguments, with which I deal below.

Discussion

41. I have set out Mr. Harrap's basic submissions at some length, but find myself unable to accept them. In my view the district judge was entitled to find that the absence of provision for the appellant was unreasonable, and the judge was plainly wrong to reverse him.

42. What I draw from the authorities, apart from the widely different factual matrices which emerge, is the proposition that the value judgment of a trial judge, who has undertaken what I may call the section 3 exercise and has reached a judgment on the evidence should not be lightly disturbed unless the conclusion reached is "plainly wrong".

43. Here I meet an immediate difficulty with Eleanor King J's judgment, sitting as she was in an appellate capacity. The first basis upon which she felt able to reverse the decision of the district judge was that he had erred in law by asking himself the wrong question. The question, as she rightly identified, was not whether the deceased had acted unreasonably, but whether, on an objective basis, having considered all the factors in section 3 of the Act, the resulting provision, or lack of it, was unreasonable.

44. With great respect to the judge, I do not think that her criticism of the district judge (that he asked the wrong question) is sustainable. Having gone meticulously through the section 3 factors, and having cited the very passage from ***Re Coventry*** which emphasises that the result must be unreasonable (as well as including a citation from ***Espinosa v Bourke)***, the district judge concluded this part of his judgment by saying:

> "In my judgment, all of the above factors ***have produced an unreasonable result*** (emphasis supplied) in that no provision at all was made for (the appellant) in her mother's will in circumstances where (the appellant) is in some financial need. However, I also accept that (the appellant) has not had any expectancy of any provision for herself. (The appellant and her husband) have managed their life over many years without any expectancy that (the appellant) would receive anything. That does not mean that ***the result is a reasonable one*** (emphasis again supplied) in the straightened financial circumstances of the family. But it does mean, in my judgment, that any provision now must be limited."

45. In my judgment it is plain that the district judge asked himself the right question, and that the judge was wrong to find that he had erred in law by not doing so.

46. This leaves stage two (or two and three if Geoffrey Lane LJ's analysis in ***Re Coventry*** is accepted). Eleanor King J. said:

> "If I am wrong in concluding that (the district judge) erred in law and he did in fact ask himself the correct question, nevertheless in my judgment he in any event erred in his balancing of the section 3 factors with the consequence that he was plainly wrong in concluding that the deceased had failed to make reasonable provision for his daughter."

47. Later, she said: -

> "Despite looking at each section 3 factor separately, the learned judge failed thereafter to stand back and assess the impact of them when taken together. Had he done so he would, in my judgment, have concluded that, far from any of the section 3 factors tipping the balance in favour of the daughter's claim, the court was left with a filial relationship and necessitous circumstances, with nothing more of sufficient cogency to drive a court to conclude that, in all the circumstances of the case, no provision for the daughter was unreasonable provision."

48. In this latter respect, the judge was, as I have indicated, strongly supported by Mr. Harrap, who (inter alia) cited a passage from the decision of this court in ***Cunliffe v. Fielden*** [2006] Ch 361 at paragraph 23 to the effect that a judge exercising a judicial discretion was under an obligation to explain how it had come to be exercised.

49. However, with all respect both to Mr. Harrap and to the judge, I disagree. There are, in my view, two answers to this criticism. The first is that the judge did not need to carry out the balancing exercise ***at this stage.*** The second is that although he did not need to do it, this in fact is what he did. I will take these in turn.

50. The district judge undoubtedly conducted the section 3 exercise which was required to be conducted by him. It must always be remembered, I think, that it is the Act and the Act alone which identifies the criteria for the exercise of the court's powers. There was no extra burden on the applicant. The district judge had to decide whether on all the facts of the case as found by him the deceased's dispositions were not such as to make reasonable provision for the applicant. He decided, on all the facts of the case, that no provision did not constitute reasonable provision.

51. As Arden LJ indicated in argument, if. at the end of the case, counsel for the charities had asked the district judge to identify the factors which had led him to the conclusion that no provision was unreasonable, the district judge's answer would have been "all of the factors" which he had identified in his judgment. That, in my view, would have been a proper and sufficient answer.

52. In my judgment, the district judge was not under an obligation to "balance" the section 3 factors or to explain why the combination of factors under section 3 led him to the conclusion that no provision was unreasonable. That was, as Goff LJ explained in ***Re*** *Coventry*, a value judgment which the district judge was entitled to make, and –

as the authorities indicate – that exercise should not be interfered with by an appellate court unless it is "plainly wrong".

53. I agree, however, that the district judge had to exercise a discretion in deciding what, if any, relief to award. That he did, and in doing so he explained fully and carefully precisely what relief he was minded to award and why. This was the area in which his discretion fell to be exercised. In my judgment, therefore, the criticism of him that he had not conducted the necessary "balancing exercise" is misplaced.

54. That is the first answer. There is, moreover, plainly an overlap between the value judgment that the provision is unreasonable and the exercise of the discretion in making an award. I would not wish to be too prescriptive about which element falls into which stage. What matters is that the decision, taken as a whole, explains why the judge or district judge has reached the conclusion he or she has.

55. Thus to take two examples from the instant case, the district judge rejected Mr. Harrap's submission that a daughter could not complain about lack of financial provision "if she decides against her mother's will, to throw in her lot with a man rather than remain with her mother" . The words are in inverted commas in the judgment, and presumably reflect verbatim what Mr. Harrap submitted. The district judge held (rightly in my view):

> "A daughter is entitled (indeed would be expected) to make a life with a partner of her choice and have a family of her own. She would reasonably hope that a parent would accept such a choice, and not blame her for it."

56. Secondly, the district judge held (and in my view was plainly right to hold) that it was reasonable for the appellant to remain at home and that even if she were able to obtain paid work outside the home, she would be likely to remain in some financial need, and could only support herself "to some limited extent" He said: -

> "I accept that such work would be likely to be poorly paid, and that she is likely to continue to require some subsidies for her basic living expanses."

57. In my judgment, these factors can be viewed either as elements in the discretion exercised by the district judge or as section 3 factors. Either way, they form part of a coherent decision, and provide a second reason for rejecting the proposition that the district judge failed to carry out the necessary "balancing exercise"'

58. In any event, the matters I have identified are more than sufficient to distinguish the case from ***Re Coventry, and***, as I have made clear, in my judgment the district judge's findings under the section 3 exercise are amply sufficient to enable him to reach the value judgment that the absence of provision was unreasonable.

The judge acting in an appellate capacity

59. As Wilson LJ pointed out when giving permission to appeal, had district judge Million (or, for that matter, Eleanor King J sitting at first instance) dismissed the appellant's claim, I doubt very much whether the appellant would have secured a

reversal of that dismissal on appeal. Eleanor King J was herself well aware of the criteria which she, as an appellate tribunal, had to apply: - see Part 52 of the CPR and (inter alia) ***Piglowska v Piglowski*** (supra). However, such considerations in my judgment simply underline the message of ***re Coventry*** that great weight must be attached to the value judgment reached by the court of first instance, and that any appellate court should think long and hard before coming to a contrary conclusion.

Conclusion

60. It follows that I would allow the appeal and direct that the appellant's appeal against the quantum of the district judge's decision be heard by a judge other than Eleanor King J. Whilst this is an outcome which I would direct, I urge the parties to consider carefully whether a further hearing is in anyone's interests. No doubt substantial additional costs will be incurred, and compromise, now that the appellant has won her major point, must be in the interests of everyone.

Lady Justice Arden

61. I agree with the judgment of the President and also with the judgment of Black LJ, which I have had the privilege of reading in draft since drafting my judgment. I deal only with points not already covered in the President's judgment.

62. For the reasons which the President has explained, this appeal is only concerned with the threshold question under section 3 of the Inheritance (Provision for Family and Dependants) Act ("the 1975 Act"), namely whether the District Judge's decision that the will of the testatrix did not make reasonable provision for the applicant demonstrated any error in law. It is not concerned with what provision the court should make if the threshold question is answered in the applicant's favour. For the purposes of review by an appellate court, the determination by the trial court that the testatrix's will is or is not such that reasonable provision for the applicant was not made is not properly described as an exercise of a discretion. It is one where there is room for a legitimate difference of opinion and therefore an appellate court should not interfere unless it is satisfied that the judge proceeded on the basis of the wrong principle or it is satisfied that the judge has reached a conclusion which is plainly wrong. We are accordingly concerned with two questions: first, whether the District Judge directed himself to the right question under section 3, and, secondly, whether the conclusion he reached was plainly wrong so as to call for intervention by an appellate court.

63. As the President and Black LJ have explained, when his judgment is read as a whole, it is clear the District Judge correctly directed himself as to the question to be decided. He then, in my judgment, for the reasons given below, carried out the exercises of evaluation and balancing required of him in a sufficient manner, and certainly, with respect to the careful judgment of the judge, in a manner which does not meet the grounds for intervention by an appellate court, as explained above. Cases under the 1975 Act are very fact-specific and, moreover, there are different ways of expressing the exercise of a value judgment.

64. The District Judge might usefully have devoted a separate paragraph of his judgment to the evaluation exercise, drawing the various threads together. However, section 3 of the 1975 Act lends itself to the way the District Judge approached the exercise in

this case, namely by going through the specific matters to which Parliament requires judges to have regard one by one. The structure of section 3 led Sir John Knox in *Re Hancock* [1998] 2 FLR 346 at 357 to explain that what the judge had to do was to put any factor which had weight into the appropriate side of the scale:

> "In the great majority of contested applications the court is involved in a balancing exercise among the many factors to which s 3 of the Inheritance (Provision for Family and Dependants) Act 1975 requires the court to have regard. Some factors may be neutral but many will go into the scales either in favour of or against the proposition that there has been a failure to make reasonable financial provision for the applicant. In *Re Coventry* ... there was placed in the scales a factor of major weight against the proposition that there had been a failure to make reasonable financial provision and that was that the plaintiff was capable of earning, and was earning, his living. This meant that for the scales to be turned and for the court to find that there had been a failure to make reasonable financial provision for the plaintiff a factor of great weight would be needed in the opposite scale. Typically, the weightiest factor in favour of an applicant seeking to show that there has been a failure to make reasonable financial provision for him or her, is present when there is found to have been a moral obligation on the deceased to make financial provision for the applicant. But that factor was held by Oliver J not to be present in *Re Coventry* . . . [The] argument that an adult child cannot make a successful application, unless he or she can establish a moral obligation by the deceased or some other special reason to show that there was a failure to make reasonable provision, is only correct to the extent that it means that there must be some reason for the court to decide that the scales fall in favour of the conclusion that there has been a failure to make reasonable provision. So limited, the submission is a truism which does not advance the argument. What is not permissible is to use *Re Coventry*, or indeed any other authority, to establish that any particular factor has to be placed on one side or the other of the scales. Of course there has to be a reason justifying a court's conclusion that there has been a failure to make reasonable financial provision but the use of the phrase "special circumstance" does not advance the argument. The word "special" means no more than what is needed to overcome the factors in the opposite scale."

65. In *Espinosa v Bourke*, Butler-Sloss P approved this passage and added that this passage was "particularly helpful to remind us of the right way to approach this class of case under the [1975] Act."

66. The District Judge essentially followed the approach of Knox J in this case. He reached the conclusion that the combination of the applicant's financial circumstances, the size of the estate, the absence of countervailing demands for financial help from the testatrix and the unreasonable conduct of the testatrix towards

her daughter meant that reasonable provision had not been made for the applicant. Those factors outweighed other factors, such as the applicant's own conduct towards the testatrix. At the same time the District Judge expressly discounted other factors, such as the question of any disability on the part of the applicant.

67. The totemic phrase in section 2 (1) of the 1975 Act is "reasonable financial provision". This phrase has a constant meaning, but its application in any individual case must take account of the circumstances of the case and current social conditions and values. There were three notable value judgments by the District Judge in this case. In the first of these, the District Judge held in a passage already cited that the applicant was entitled to make her life with a partner of her choice and to have a family of her own. In the second of these, the District Judge held that it was reasonable for her to wish to remain at home for the time being rather than work (outside the home). In the third of these the District Judge held that families, such as those of the applicant and her husband, "were not all to be blamed for their lack of income which makes a claim for tax credits necessary and possible." These were evaluations for the District Judge to make in the circumstances of this case. In my judgment the conclusions of the District Judge cannot be said to be plainly wrong.

68. Indeed, these three value judgments made by the District Judge demonstrate how under the 1975 Act the court must make value judgments in order to arrive at a decision as to whether the provision made by a testatrix constituted reasonable financial provision. I am not concerned that a judge should be called on to make such judgments. It is a reality in the twenty-first century that judges are called upon to make judgments of this kind in different cases and in different circumstances. They must do so with such assistance as they can find in existing decided cases. If (as often happens) there are no decided cases, they must decide questions involving value judgments within four corners of the statutory framework and with the benefit of their own awareness and experience of society and social issues, and their own considered view of how such matters ought fairly to be decided in the society in which we live. It is worthy of note that there was no other way that the District Judge could have made the three value judgments discussed in this paragraph. Judges are not unaccountable for value judgments. Those value judgments can be reviewed on appeal using the test described above.

69. The judge took the view that there had to be some separate factor apart from just a filial relationship and "necessitous circumstances", that is, the need for maintenance. For the reasons already given, the conclusion of the District Judge was not on analysis based solely on filial relationship and financial need. In any event, however, the additional factor which the judge found necessary is not, in my judgment, required by the authorities. The court is required to look at *all* the factors listed in section 3. These include actual and prospective financial resources, which would include the ability to earn a suitable income. The financial circumstances of the applicant need to be considered against all the other factors in the case. It is in that sense that need alone is not enough. Thus in her judgment in *Espinosa v Bourke* [1999]1 FLR 747, Butler-Sloss P held:

> "An adult child is, consequently, in no different position from any other applicant who has to prove his case. The court has to have regard to s 3(1)(a)–(g) and assess the relevance and the weight to be given to each factor in the list. If the

> applicant is of working age, with a job or capable of obtaining a job which would be available, the factors in favour of his claim for financial provision may not be of much weight in the scales. As Oliver J pointed out in *Re Coventry*, necessitous circumstances cannot be *in themselves* the reason to alter the testator's dispositions. The passage from the judgment of Sir John Knox in *Re Hancock* (above) is, in my respectful view, particularly helpful to remind us of the right way to approach this class of case under the Act. .. " (emphasis added and see the passage from *re Hancock* cited above)"

70. The authorities with respect to the application of s 3 of the 1975 Act to adult children have been usefully summarised thus by the Law Commission of England and Wales in its consultation paper on Intestacy and Family Provision on Death (Law Com Consultation Paper 191, 2009):

> "2.79 It was formerly thought that a claim by an adult child would be subject to an additional threshold of "special circumstances" or a "moral claim". In *Re Hancock*, the Court of Appeal held that this was incorrect, although it may be difficult for a child who is able to earn their own living to show that reasonable financial provision has not been made for them "without some special circumstance such as a moral obligation".
> 2.80 It has subsequently been held that the word "moral" is intended only to emphasise that the obligations and responsibilities to which the court must have regard under section 3(1)(d) of the 1975 Act need not be purely legal." (footnotes omitted)

71. The Law Commission has not proposed any change in the law in this area though it may do so in its final report in the light of responses received on consultation. Thus the Law Commission's consultation paper suggests that the present law is not causing problems in practice, and thus undermines Mr Harrap's submission that the conclusion of the District Judge in this case wrongly diminished the respect that ought to be accorded to testamentary freedom and introduced an undesirable element of uncertainty which made it difficult and costly for practitioners to advise testators. The journal articles with which he subsequently provided us also do not suggest any significant concern. Accordingly, he has not, in my judgment, made good his submission.

72. It is of some relevance also to the question which this court has to decide on this appeal that Parliament has also brought the legislation up to date from time to time. For instance, under the 1938 Act, the applicant had, in the case of a child, to be under 21 or to have a physical or mental disability which meant that the applicant was not capable of maintaining himself or herself. There was an additional restriction in the case of a daughter under 21 (without a disability) that she should be unmarried, reflecting no doubt the idea that she should then look only to her husband for support. The removal of these restrictions makes it clear that Parliament intended that an adult child should be able to bring a claim even if it was possible for him or her to subsist without making a claim on the estate.

73. The applicant has made her career in the home and she is living in straightened circumstances. The applicant and her husband have lived together and brought up their family with little income save for state benefits. The District Judge was clearly correct to consider whether the applicant had any capacity for earning money herself. If she had some plan say to take a well-paid job when her family commitments enabled her to do so, that would have to be taken into account. But the absence of such a plan was rightly treated as a neutral factor. The fact that she had made this career choice did not mean that the complete absence of provision by the testatrix a reasonable one. However, as I see it provisionally and without deciding any matter as we are not dealing with quantum, the fact that this is her way of life would be relevant when it came to quantifying the amount of maintenance it would be reasonable to make.

74. In connection with the outstanding issues of quantum which I have just mentioned, I heartily endorse the last two sentences of the judgment of the President, and encourage the parties and their advisers in the strongest terms to do all that is possible to dispose of these issues without further litigation.

75. Lastly, the District Judge did not deal further with the fact that the applicant is dependent on state benefits. The fact that the state makes provision for financial hardship does not mean that it is reasonable for a testatrix to make no provision for an adult child. The court must in that regard look at all the circumstances of the case to decide that question. The size of the estate and the absence of other pressing demands on it, for instance, as in this case will be often be very relevant in this evaluation.

76. For the reasons given in the judgments of the President and Black LJ and for the additional reasons given in this judgment, I would allow this appeal.

Lady Justice Black

77. I also agree that the appeal should be allowed.

78. I do not propose to rehearse the basic facts which are to be found in the President's judgment and, in more detail, in the decision of Eleanor King J. The President has said that the appellant lives in modest circumstances. She and her husband have rented a three bedroom house from a housing association since 1984 and live there with the four youngest of their five children. She has not had paid employment since her eldest son was born around 25 years ago and the district judge considered that, with five children to look after, it would have been difficult for her to work outside the home in the past. As the youngest child was 10 by the time of the hearing before the district judge, he concluded that the appellant had "some possibility in the future of obtaining part-time work. But she does not hold a driving licence, lives in an isolated village, and is dependent on public transport and others to get to any likely work in any larger population centre". Her husband used to work as a delivery driver but now has a back problem and works only part time as a supporting actor, receiving modest earnings from occasional non-speaking roles. Eleanor King J recorded that the family income is "extremely modest", 75% of it made up of state benefits.

79. The first question ("the first question") for a court determining an application for an order under section 2 of the Act is whether the disposition made by the deceased is

such as to make reasonable financial provision for the applicant. If the answer to that is "No", the second question ("the second question") is whether and in what manner to exercise its powers in the applicant's favour. For the reasons the President gives, we are only concerned on this appeal with the first question. The appeal in relation to that needs to be broken into two parts: did the District Judge ask himself the correct question and, if he did, did he arrive at an answer that was not open to him? If he failed to ask himself the correct question, or if he erred in answering it, then Eleanor King J was bound to allow the appeal and to reach her own conclusion on the subject, as she did. The conclusion that she reached was meticulously reasoned and well within the ambit of decisions that were open to her and would not be vulnerable to the attentions of this court. The issue is whether she was correct in overturning the District Judge's decision and embarking on her own evaluation of the appellant's case.

The question that the District Judge asked himself

80. I can understand entirely why Eleanor King J was troubled about the District Judge's formulation of the first question. Paragraph 64 of his judgment is, and is obviously intended to be, a consideration of the reasonableness of the deceased's conduct rather than of the result produced by her will. It reads:

> "64. I am satisfied therefore that the rejection by the mother of her only child at the age of 17, and which she then maintained for the rest of her life, was unreasonable, and that has led to Mrs Jackson unreasonably excluding her daughter from any financial provision in her will, despite her daughter's obviously constrained and needy financial circumstances and her daughter's wish for and attempts at a reconciliation. The reasons given by Mrs Jackson for excluding her daughter are set out in her letters written in 1984 and 2002. Both contain a number of factual inaccuracies in the attempt to explain the decision, which adds to and supports the unfairness."

If the District Judge had left it at that, and concluded on that basis that the answer to the first question was "No", he would undoubtedly have been in error. Where I differ from Eleanor King J is that in my view the District Judge then moved on both to set out and to answer the correct question.

81. I conclude this from paragraphs 65 to 67 of the District Judge's judgment.

82. No one would quibble, I think, with the appropriateness of the test set out in the extract from ***Re Coventry*** (supra) which the District Judge cited at paragraph 65 and said he bore in mind and which was as follows:

> "Subject to the court's powers under the Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession. In order to enable the court to interfere with and reform those dispositions it must, in my judgment, be shown, not just that the deceased acted

> unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant – and that means, in the case of an applicant other than a spouse for that applicant's maintenance." [495E]

83. At paragraph 66, the District Judge then chose to cite extracts from two of the judgments in ***Espinosa v Bourke*** (supra), both of which had particular relevance to the instant case. The first extract is from Butler-Sloss LJ and identifies the difficulty for an applicant of working age with a job or capable of obtaining a job in establishing a claim for financial provision (see 755G which is included in the passage set out by the President at paragraph 34 above). The second extract is from the judgment of Aldous LJ and is to the effect that there should not be a preconceived notion that there is a heavy burden on applicants of full age and that all the circumstances of the applicant have to be considered (see 760G which is included in the passage set out by the President at paragraph 36 above).

84. The District Judge's concluding paragraph in relation to the first question is paragraph 67, which the President quotes in full at paragraph 45 above. It reveals a consideration which is not confined to the unreasonableness (in the District Judge's view) of the deceased's conduct but also extends to "all of the above factors" which he said (in wording reflecting that used in his earlier quotation from ***Re Coventry***) combined to produce "an unreasonable result in that no provision at all was made for [the appellant] in her mother's will". It was to section 3(1) that the District Judge was obliged to have regard in answering the first question and the factors that appear in section 3(1) are replicated in his paragraphs 48 to 63 and are plainly the factors to which he was referring when he referred to "all of the above factors". Paragraphs 48 to 63 in their turn draw on the findings that the District Judge had made about the history and the appellant's personal and financial circumstances in the preceding part of his judgment.

85. Had the District Judge been asking himself the wrong question, focussed on the reasonableness of the deceased's conduct and not of the result, he would have had no need to go beyond his paragraph 64 which would have determined that question. The fact that he went on to include paragraphs 65 to 67 and the contents of those paragraphs show that the question he was intent upon answering was the correct one.

The District Judge's answer

86. As my Lord, the President, has said, the authorities classify the first question as a value judgment or qualitative decision.

87. Mr Harrap submitted that even if the District Judge had set himself the correct question, he had fallen into error in the way in which he answered it and that his value judgment was wrong. Mr Harrap's submissions were shaped by concern that testamentary freedom should not be undermined by an interpretation of the Act and the authorities which would permit an application for provision by an adult child of the deceased on the basis of need alone. He argued that such an interpretation would deprive testators of their freedom to dispose of their estate as they wished and would require solicitors to make enquiry into the circumstances of their clients' adult children before they could advise them on their wills. Furthermore, the less

circumscribed the category of those who might be granted relief under the Act, the more difficult it would be for proper advice to be given so that testators could make their wills proof against claims. Accordingly, Mr Harrap argued forcefully that the existing authorities have clearly established that need alone is not enough and that that position must be preserved. He submitted that the only factors in play here were the mother/daughter relationship and the daughter's financial need and that Eleanor King J was therefore bound to conclude that it was not open to the District Judge to find that the will failed to make reasonable provision for the appellant.

88. A dispassionate study of each of the matters set out in section 3(1) will not provide the answer to the question whether the will makes reasonable financial provision for the applicant, no matter how thorough and careful it is. As Judge LJ said in ***Re Hancock*** at 355C, section 3 provides no guidance about the relative importance to be attached to each of the relevant criteria. So between the dispassionate study and the answer to the first question lies the value judgment to which the authorities have referred. It seems to me that the jurisprudence reveals a struggle to articulate, for the benefit of the parties in the particular case and of practitioners, how that value judgment has been, or should be, made on a given set of facts. Inevitably, this has led to statements that this or that matter is not enough to found a claim and this or that matter is required.

89. Mere financial need has been one of those matters rejected at times as not enough. Oliver J remarked in ***Re Coventry*** (476D), in a passage which found approval in the Court of Appeal, that:

> "the mere fact that the plaintiff finds himself in necessitous circumstances cannot, in my judgment, by itself render it unreasonable that no provision has, in the events which have happened, been made for his maintenance out of the deceased's estate."

90. This sentiment can be found reflected in other authorities, including in ***Espinosa v Bourke*** which has the distinction of being the most recent Court of Appeal authority on the Act to which we were taken in argument and which includes the following endorsement in the judgment of Butler-Sloss LJ:

> "As Oliver J pointed out in *Re Coventry*, necessitous circumstances cannot be in themselves the reason to alter the testator's dispositions. "

91. A close analysis of the authorities reveals, however, that a bald statement of that kind can be misleading if taken out of context. Necessitous circumstances will never actually be the sole factor from amongst the section 3(1) list to feature in a case.

- The size and nature of the estate (section 3(1)(e)) will always be material.

- Consideration will always have to be given to the situation of any other beneficiary of the estate (section 3(1)(c)) because the proceedings would not exist if there were not at least one such beneficiary. It was said in ***Cameron v Treasury Solicitor*** that the devolution of the estate to the Crown could not enhance the applicant's claim and was a neutral factor, not relevant to the

criteria to be taken into account under section 3, but I do confess to some difficulty with that approach because, if the presence of a needy beneficiary has the potential to weaken the applicant's claim (as it must have where the estate is limited), so must the absence of any beneficiary in the conventional sort of need have the potential to assist the applicant. I suspect that it may be an approach which should be seen in the light of the facts of that particular case in which the applicant had the fundamental difficulty that she had been divorced from the deceased 19 years before he died and a clean break order had been made in ancillary relief proceedings; one can see why, therefore, the fact that the estate devolved to the Crown as bona vacantia was not of assistance to her in establishing her claim.

- Section 3(1)(g), drafted as it is in very broad terms, may well draw in other factors depending on the facts of the individual case, amongst them potentially the views of the deceased. Goff LJ said in ***Re Coventry*** [488H] that a view expressed by a deceased person that he wishes a particular person to benefit will generally be of little significance, because the question is not subjective but objective, but that an express reason for rejecting the applicant is a different matter and may be very relevant to the problem. Butler-Sloss LJ said in ***Re Hancock*** (supra):

> "A good reason to exclude a member of the family has to be a relevant consideration. However, in my view, the recognition by a testator of the status of members of his family and his goodwill towards them and in this case towards the plaintiff are factors which it is proper to take into account under s 3(1)(g) and it is for the court to give such weight to those factors as may in the individual case be appropriate." [352E]

92. The search for the elusive feature which tips the balance in favour of this claimant and not in favour of that has concentrated on two candidates in particular, moral obligation and special circumstances. Despite the fact that the Court of Appeal said in ***Re Coventry*** that Oliver J had not made moral obligation a pre-requisite and nor did they, moral obligation continued to feature in subsequent decisions, albeit perhaps as a sub-species of special circumstances. For example, in ***In re Jennings*** Nourse LJ said that it had been established that

> "on an application by an adult son of the deceased who is able to earn, and earns, his own living there must be some special circumstance, typically a moral obligation of the deceased towards him, before the first question can be determined in his favour" [295F]

93. Nourse LJ later moderated this in ***Re Pearce*** (supra), considering that ***Re Hancock*** had demonstrated that

> "the principle is not to be stated in such seemingly absolute terms. There is no invariable prerequisite that a moral obligation or some other special circumstances must be shown….." [710D]

94. ***Re Hancock*** is, in my view, an important decision. I will not rehearse the passages from it which the President has cited in his judgment. As Nourse LJ said, the court rejected the idea that a moral claim or special circumstances were necessarily required (or, per Sir John Knox at 358B, that there is any "single essential factor for the success or failure of an application under the Act") although they recognised that there may be factual situations such as in ***Re Coventry*** and, even more so in ***Re Jennings***, in which something of that sort would be required to persuade the court that the scales tipped in favour of the applicant. Sir John Knox's treatment (in the passage quoted by the President) of the process of evaluation of a claim under the Act is particularly helpful in reminding us of the right way to approach the present class of case under the Act, as Butler-Sloss LJ said in ***Espinosa v Bourke*** at 755H.

95. One of the things that I draw from ***Re Hancock*** as a whole is the importance of having recourse directly to the words of the statute itself. The courts have said that it is inappropriate to put a gloss on those words. Peter Gibson LJ said so in relation to the assertion that the applicant must have a moral claim in order to succeed, see ***Cameron v Treasury Solicitor*** [722B]. Butler-Sloss LJ said in ***Espinosa v Bourke*** [755F] that "[f]rom the judgments of this court in *Re Coventry* to the present day, it should be clear that no gloss has been put upon subsection (1)(d)". Whilst these passages revolve around section 3(1)(d), it is surely equally unacceptable to put a gloss on any other part of the relevant sections of the Act.

96. Mr Harrap's submissions seem to me to be an invitation to us to embellish the words of the statute and amount, in my view, to an impermissible attempt to prescribe the exercise that has to be carried out in this sort of case by requiring the application of a principle of some kind in addition to the plain words of the statute itself.

97. Contrary to his submissions, an adult child of the deceased is:

> "in no different position from any other applicant who has to prove his case. The court has to have regard to s 3(1)((a)-(g) and assess the relevance and weight to be given to each factor in the list." ***Espinosa v Bourke*** [755F]

98. Each case depends upon its own facts and upon how the judge strikes the balance between the section 3(1) factors in first answering the question whether reasonable financial provision has been made for the applicant and then determining what order to make. That is clear throughout the line of authorities from ***Re Coventry*** onwards. The following passages are examples only of what has been said:

> "In every case, inevitably it is going to be a matter of degree….
>
> ….In the end, to my mind Oliver J struck a balance and reached a conclusion which I find it impossible to fault…" ***Re Coventry*** [493D and G]
>
> "A judge making a decision at the first stage, although he does not exercise a discretion, does make a value judgment based upon balancing the factors set out in s 3 of the 1975 Act." ***Re Hancock*** [353H]

> "In the great majority of contested applications the court is involved in a balancing exercise among the many factors to which s 3 of the 1975 Act requires the court to have regard. Some factors may be neutral but many will go in the scales either in favour of or against the proposition that there has been a failure to make reasonable financial provision for the applicant." ***ibid*** [357A]
>
> "Section 3(1) of the 1975 Act sets out the matters to which the court has to have regard.
>
> It is a complete list……
>
> The task of the court is that required by s 3 of the Act. It is therefore incumbent upon the court to consider all the matters referred to in subsection (1) of that section…." ***Espinosa v Bourke*** [760D]

99. The value judgment that the trial judge makes at the first stage is not lightly to be interfered with. This has been said repeatedly. The following extracts exemplify how it has been put over the years:

> "The second part of that composite problem is clearly a question of discretion, but I think the first is not. It is a question of fact, but it is a value judgment, or a qualitative decision, which I think ought not to be interfered with by us unless we are satisfied that it was plainly wrong." ***Re Coventry*** [487B]
>
> "Now whatever the rights and wrongs of this matter may be, it seems to me that this was par excellence a case in which the decision of the judge should stand as to what is reasonable and what is not reasonable, unless it is clearly shown that he has gone wrong on a point of law, or in some way has misapplied the facts of the case to the law. Particularly in the case of small estates such as this one, appeals like this to this court are strongly to be discouraged. " ***ibid*** [492G], underlined in ***Re Hancock*** [353H] and adopted in ***Re Pearce*** [717]
>
> The decision which falls to be made by a court in a case of this kind is essentially a qualitative decision; that is to say, the decision whether the disposition which the deceased has made, if any, is such as to make reasonable financial provision for the applicant. It is a qualitative decision, or what is sometimes called a 'value judgment'. A decision of that kind is one which is particularly difficult to disturb on appeal, unless the judge of first instance has clearly proceeded on some error of principle. There is no indication that I can find in Oliver J's judgment that he failed to take account of any relevant circumstance that he ought to have taken account of, or that he paid attention to anything to which he ought not to have paid attention, or that he erred in principle in any way." ***Ibid*** [495H]

> "I am conscious that the decision of the judge was a value judgment which should not be interfered with by this court unless this court is satisfied that it is plainly wrong." ***Espinosa v Bourke*** [759A]

100. The district judge set out the relevant factors and I am not persuaded that he failed thereafter to take them into account in arriving at his value judgment, nor am I persuaded that he gave undue weight to the unreasonableness of the deceased's actions or allowed financial need to dictate the outcome without putting it into the context of all of the circumstances of the case. In my view, it has not been demonstrated that the decision he reached was plainly wrong. It follows that Eleanor King J was wrong to allow the appeal to her and to substitute her own decision.

101. I would particularly associate myself with the President's remarks about the need to avoid further litigation if at all possible. It will serve nobody's interests for this matter to return to the Family Division for yet another appeal if that can be avoided.