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When the wife becomes the widow

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When the wife becomes the widow: Financial remedy and Inheritance Act claims

Annie Ward

75 years

In the Family Court sitting at Westminster **Case No. 1**

Between

CATHERINE TUDOR

Petitioner

and

HENRY TUDOR

Respondent

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The Facts

26 year marriage.

1 daughter, Mary, now 19 years old. She is in her first year at university. She is considering taking a law conversion course afterwards.

Catherine (W) is 54 and earns c£6,000 pa as a part-time Spanish teacher. She is Spanish by birth.

Henry (H) is 45. He is the CEO of a family headhunting company (Tudor & York Ltd.). He inherited his majority shareholding from his father.

H has been living with AB (35) since separation over two years ago.

H has a degenerative condition caused by a car accident which took place shortly after separation. His life expectancy is reduced by c10 years. He has mobility issues. His working life is also shortened.

H has a son, Hal, 9 years old who has spina bifida.

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Asset schedule	
FMH	£500,000
less costs of sale	-£15,000
net equity	**£485,000**
W's Aragon house	**£90,000 (1/2 of €200,000)**
Proceeds of PI claim	**£150,000**
Liquid assets	**£725,000**
Shares in T&Y	£1,000,000
less CGT (ER)	-£100,000
net value	**£900,000**
Fidelity pension	**£400,000**
TOTAL	**£2,025,000**

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Competing arguments

- W agrees an immediate sale of the FMH and seeks 75% of the FMH on a needs basis for herself and Mary, as H is already housed with AB
- W seeks a lump sum of £75,000 – being half of H's PI award. This was partly argued on a "*sharing*" and partly on a "*needs*" basis
- W seeks an order transferring 40% of H's shares in T&Y to her. She offers to assign the voting rights to H. She submits that the transfer would be subject to holdover relief
- W seeks a PSO order for 50% by capital value
- W seeks spousal PPs for life of £35,000 pa and £10,000 pa for Mary until the end of her tertiary education. She also seeks an order for H to pay all Mary's tertiary education costs
- W asserts the Aragon property is non-matrimonial

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- H asserts that this is a case for sharing the matrimonial assets equally but that both his shares in T&Y and his PI award are non-matrimonial
- H also seeks an immediate sale of the FMH and equal division of the net equity
- H offers an equal division of the pension benefits
- H submits there be PPs at the rate of £20,000 pa for two years – until Mary finishes tertiary education. He offers £5,000 pa for Mary and will meet her education costs
- H argues his disabilities require extra capital resources and that his earnings will reduce in future.

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H submits that a deferred clean break is appropriate as:

- W should increase her earnings to c£12,000 pa
- W's housing needs can be met by her half share of the FMH
- After cessation of the PPs W will have her earnings, her share of the net equity in the Aragon property and can draw down from the shared pension
- H's earnings are likely to be limited in future and he will look to pass his shares in T&Y to the next generation, including Mary if she decides not to pursue a legal career
- He requires his half share of the FMH to allow him to buy an adapted property and other capital items needed owing to his disabilities
- AB's capital is irrelevant

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How will the court approach H's disability?

Law: MCA 1973 S25:

- S25 (1): *"It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A, 24B or 24E above and, if so, in what manner, to have regard to all the circumstances of the case…."*
- S25 (2) (a) "*the income, earning capacity, property* ***and other financial resources*** *which each of the parties to the marriage has or is likely to have in the foreseeable future…."*
- S25 (2) (b) "*the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;"*
- S25 (2) (d) "*the age of each party to the marriage and the duration of the marriage;"*
- S25 (2) (e) "*any physical or mental disability of either of the parties to the marriage;"*

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The approach as to H's PI award:

Wagstaff v Wagstaff [1992] 1 FCR 305 CA (distinguishing ***Daubney v Daubney*** [1976] Fam 267) Butler-Sloss LJ:

- H's damages are part of his resources under S25 (2) (a). See also ***Pritchard v JH Cobden & Anor*** [1988] Fam 22
- Damages for pain, suffering and loss of amenity should be taken into account
- Each case must be considered on its facts
- Capital awarded in the PI claim might be needed to meet a need identified under S25 (2) (b)
- The injured party's "*disability and consequential needs (are) very important"* and although they take priority must be balanced with the other party's needs to achieve fairness

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Butler-Sloss in ***Wagstaff:***

"*I do not understand Scarman LJ [in **Daubney**] as saying that no part of damages awarded under the head of pain, suffering and loss of amenity should be charged by the other spouse but, if he did, then I respectfully disagree. The reasons for the availability of the capital in the hands of one spouse, together with the size of the award, are relevant factors in all the circumstances of s 25. But the capital sum awarded is not sacrosanct, nor any part of it secured against the application of the other spouse….*

In general, the reasons for the availability of the capital by way of damages must temper the extent of, and in some instances may exclude the sharing of, such capital with the other spouse. It is important to stress yet again that each case must be considered on its own facts."

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Mesher orders:

In ***Mansfield v Mansfield*** [2011] CA Thorpe, Jackson and Black LJJ allowed an appeal and imposed a *Mesher* rather than an outright lump sum order to meet both the needs of W and the children for housing and then H, whose PI award was the main part of the assets.

Thorpe LJ:

"So it seems to me that the exceptional factor in this case, namely the origin of the family capital or the vast majority of the family capital, makes it particularly suitable for the application of a ***Mesher*** *order. Accordingly, I would quantify the extent of the husband's reversionary interest, or residual interest, at one third of the capital awarded to the wife, but particularly expressed in the bricks and mortar in which the money is invested."*

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How will the court approach H's reduced life expectancy?

M v M [1994] 2 FCR 174 CA Balcombe LJ and Sir Francis Purchas.

Facts*:*

- ❖ Parties separated in 1990 after 13 year marriage
- ❖ Two children aged 14 and 13 at time of hearing
- ❖ W had cancer and a life expectancy of 5 to 10 years
- ❖ The assets of the marriage had come from H
- ❖ H was living with his new partner in her house
- ❖ H was a GP earning c£54,000 pa
- ❖ W was reliant on state benefits

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CA upheld order of HHJ on appeal from the DJ that:

- Lifetime spousal PPs appropriate on the facts given W's illness
- Court correct to order one year deferred sale of FMH rather than an immediate forced sale
- Correct to divide net equity of FMH 75%:25% in W's favour to allow her to house herself and children
- A charge in favour of H exercisable on W's death of 75% of W's capital from the FMH recognized both W's fair share in the matrimonial assets and H and the children's future needs for housing, and was not plainly wrong

Also see ***M v M*** [2015] HHJ Wildblood for the need to balance W's entitlement to a fair share at the end of a marriage with her shortened life expectancy and consequential needs

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The judgment:

- The FMH be sold forthwith and the net proceeds divided as to 60% to W and 40% to H
- H should pay a lump sum of £50,000 to W (from which her outstanding legal costs of £30,000 would be paid)
- H should pay W PPs during their joint lives at the rate of £30,000 pa reducing to £0.05 on her 67th birthday (when H would be 58)
- She found that the shares in T&Y were non-matrimonial but were in any event the source of the income stream

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- The judge found that although H's interest in T&Y was worth £1m gross there was little liquidity in the company but that it was an income stream of £80,000 net pa
- DJ specifically stated that she was not making any order as to H's shares in T&Y on the basis that if he sold them W might apply to capitalise her maintenance
- There be a pension sharing order to balance their pension benefits by capital value
- DJ found that the Spanish property was a non-matrimonial asset
- DJ ordered H to pay Mary's future education costs whilst she completes her first degree

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Sadly H dies after receipt of the judgment but before it is sealed and before DA. What happens to the application?

The MCA provides remedies only upon divorce and not death. Such awards only take effect on DA:
MCA 1973 S23 (5) *"where an order is made under subsection (1)(a), (b) or (c) above on or after granting a decree of divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute."*

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- A decree cannot be sought after the death of a party: ***Stanhope v Stanhope*** (1886) 11 PD 103 once death has ended a marriage, it cannot be dissolved through the courts
- There is no jurisdiction to hear an application for ancillary relief after the death of one of the parties: ***D'Este* v *D'Este*** [1973] Fam 55
- As Scott Baker J said in ***Amey v Amey*** [1992] 1 FCR 289:

  "I cannot any longer exercise a discretion under s 25 of the Matrimonial Causes Act 1973 for the wife is dead."

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What if H had died after decree absolute and after the judgment had been delivered to the parties but not sealed?

The order would have been enforceable: ***McMinn v McMinn*** (Ancillary Relief: Death of a party to proceedings) [2002] EWHC 1194 (Fam)

Black J: *"it is clear that it is not a necessary prerequisite for an order either that the order has been formally typed up, stamped and/or issued by the court or that every last detail of the arrangements should have been resolved by the court". "In summary, therefore, s 23(5) apart, I consider that the district judge made an order for ancillary relief on [date]"*

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Costs:

- When a party dies before decree absolute one of the more concerning issues for the surviving party is that the costs of both sides to that point are essentially wasted
- If the death happens before DA then there is no possibility of enforcing anything but past costs orders
- Conversely, if DA has been pronounced and judgment given then the court could determine costs applications even after the death of a party: ***McMinn:*** Black J*:*

"I do not consider that the absence of provision as to costs in the district judge's written judgment prevented it from being an order, particularly given that he made provision for a means by which any costs issue that there might be could be resolved"

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What happens if Henry dies after judgment and decree absolute?

Catherine instructs Helen Brander of Pump Court Chambers….

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DEATH OF A FORMER SPOUSE

Helen Brander

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Death Following Divorce

Has a financial remedy order on divorce / dissolution been made?

- If so, will or should the death of a former spouse mean that the outcome of those proceedings can and should be altered?
- Death of a former spouse does not automatically invalidate the original financial remedy order.
- The person seeking to set aside the order will have to show that there has been a *Barder* event – a supervening event that invalidates the fundamental assumption on which the order was made.

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Barder v Barder [1987] 2 FLR 480, HL

A court having jurisdiction to grant leave to appeal out of time might properly exercise its discretion to do so on the ground of new events provided that:

(i) They invalidated the fundamental assumption on which the order was made, so that if leave were given, the appeal would be certain or very likely to succeed.

(ii) The new events had occurred within a relatively short time, probably less than a year, of the order being made.

(iii) The application for leave to appeal out of time had been made promptly; and

(iv) The application does not prejudice third parties who had acquired, in good faith and for valuable consideration, interests in property which was the subject matter of the relevant order.

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FACTS IN *BARDER*

- Shortly after making final ancillary relief order, the wife killed the parties' children before taking her own life.
- The financial settlement had been based on the fundamental assumption that the wife and the children had housing needs.
- The wife's and children's deaths invalidated the basis for the order.
- Effect was that W's administrator (her mother) did not take and H did.

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SMITH V SMITH (SMITH AND ORS INTERVENING)

[1991] 2 FLR 432, CA

Death justified a change of the original order

- H and W married in December 1955. Decree Absolute in 1988.
- W applied for ancillary relief when she was 52 and H was 62.
- Registrar considered equal division of assets was only just conclusion and made an order for £54k lump sum to W.
- 6 months later in May 1989, W committed suicide and left her estate, including the lump sum, to her daughter.
- H appealed.
- On H's appeal Judge assessed W's needs as those of the estate, i.e. her debts, but otherwise they were non-existent. The order was varied to require the estate to repay H the lump sum, save for a sum to pay W's debts.

PUMP COURT CHAMBERS

SMITH V SMITH (SMITH AND ORS INTERVENING) [1991] 2 FLR 432, CA (Cont.)

- W's daughter appealed.
- CoA allowed the daughter's appeal.
- The issue was the right order to be made between H and W where W was known to have 6 months or so to live.
- W's needs were limited to a brief period.
- A clean break would have been unlikely.
- Needs were not the only criteria for consideration. The s.25(2) criteria have to be considered.
- W had made an equal contribution to the marriage over 30 years and had a right to recognition of that contribution.
- Registrar's order varied so that W received £25k (which would then pass under her estate).

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SMITH V SMITH (SMITH AND ORS INTERVENING) [1991] 2 FLR 432, CA (Cont.)

- Eventual destination of W's estate was irrelevant. W could leave it in any manner she wished.
- The argument that an order should not be made for the purpose of benefiting an adult child did not arise.

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BARBER V BARBER [1993]1 FLR 476

Death justifies a change of order

- Following decree nisi, W (41 years old) became ill with liver disease.
- Medical evidence at final hearing was that she could hope to live at least another 5 years.
- H had the children living with him.
- The judge at first instance ordered that the FMH be sold and W receive £125k to buy a home and periodical payments to meet income needs.
- W died less than 3 months later (after decree absolute).

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BARBER V BARBER [1993]1 FLR 476

- H appealed, arguing W was to have sufficient capital to rehouse in a property where the children could stay / live with her and this need was no longer there.
- W's estate had passed to her children on statutory trusts on her intestacy.
- H sought to avoid the sale of the family home, into which he and the children had returned to live.

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BARBER V BARBER [1993]1 FLR 476

- HELD the correct approach is to consider what order would be made where there was knowledge that W would have only 3 months to live.
- W would have stayed in the FMH, H would have maintained her, she would retain her 50% share, and there would have been no capital order made in her favour.
- She had made a substantial marital contribution. Her share of the family home had effectively passed to her sons.
- The order would be varied so that the children would retain a 40% share of the family home to take account of H having to bring them up and the property would not be sold without H's consent pending the youngest reached his majority.

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REID v REID [2004] 1 FLR 736

Death justifies a change of order

- 40 year marriage.
- Consent order dismissing all claims recited an agreement between H and W that the FMH be sold and NPOS divided 40% to W, 60% to H. H needed to rehouse. W did not.
- 2 months after date of order and 15 days after decree absolute, W died of a heart attack, aged 74.
- W disclosed in proceedings she was registered blind, had high blood pressure, had high cholesterol, was diabetic.
- W's actuarial life expectancy of a 74 year-old woman was 13 years.
- H appealed, arguing that the NPOS should be divided 75% / 25% in his favour.

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REID v REID [2004] 1 FLR 736

- W's executors countered that:
- (a) the early death of a 74-year-old woman was foreseeable and could not qualify as a new event;
- (b) post *White* W was entitled to an award based on contributions rather than needs;
- (c) W could choose what she did with her share, including bequeathing it by will;
- (d) W had received less than half the value of the property to meet H's needs and a further reduction of her share was not justified.

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REID v REID [2004] 1 FLR 736

- **HELD**
- W's death 2 months after the order amounted to a new event which had not been reasonably foreseeable.
- Had it been known that she only had 2 further months to live, what was the appropriate order? Length of W's future needs would be the subject of a severe contraction.
- H needed an increase in his liquid capital as he had small pension income.
- The recited agreement of the parties would not be disturbed, but the mechanism to alter the division would be an order for W to pay a lump sum to H.

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Richardson v Richardson [2011] 2 FLR 244

Death did not justify a change to the original order

- H and W had 46-year marriage.
- Ran a hotel business together as equal partners.
- Net value of assets on divorce was c.£11m.
- No allowance made for a potential claim arising from an accident some years earlier where a child fell from the hotel window and suffered injury.
- Both parties believed any claim would be covered by insurance.
- W received 47.5% assets (hers were more liquid than H's). She was to resign from partnership and H would indemnify her against all partnership liabilities.
- This occurred shortly after order made.

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Richardson v Richardson [2011] 2 FLR 244 (Cont.)

- 6 weeks after order made, W died suddenly of a heart attack.
- The parties' son was sole executor and beneficiary of estate.
- 12 weeks after final order (5 years after child's accident) H became aware insurer had avoided the insurance policy. His insurance broker and accounts manager had been aware it was likely, but H had not been.
- H appealed the order out of time on the basis of a *Barder* event (W's death) and alternatively on the basis of vitiating mistake (that the parties were initially under-insured and, indeed, not insured).

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Richardson v Richardson [2011] 2 FLR 244 (Cont.)

- Held that W's death was not a *Barder* event as, although her death was unforeseen, the basis upon which the order was made – equal sharing in the fruits of the marriage as a result of W's equal contribution by being an active business partner – still stood and was not invalidated. The order was not referable to her needs or her future expectation of life.
- H's failure to note that the original insurance cover was likely to be less than that required to meet any claim for damages was not a vitiating factor.
- BUT H's (and W's) lack of knowledge that they were, indeed, uninsured WAS a vitiating factor. Appeal allowed.

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Richardson v Richardson [2011] 2 FLR 244 (Per Curiam)

- Per Thorpe LJ (with whom the other judges agreed (Munby and Rimer LJJ):

"Cases in which a Barder *event, as opposed to a vitiating factor, can be successfully argued are extremely rare, should be regarded by the specialist profession as exceedingly rare, and should not be thought to be extendable by ingenuity or the lowering of the judicially created bar."*

WA v EXECUTORS OF ESTATE OF HA (DEC'D) [2016] 1 FLR 1360

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Death justified a change to the original order

- H and W married in 1997. 3 children under the age of 14 upon separation.
- Neither party worked during the marriage but their contributions to the marriage were significant.
- H was awarded £17.34m by agreement, to be paid in two tranches.
- First tranche was paid.
- 22 days later H committed suicide.
- H left his estate to his three adult siblings.
- W applied for permission to appeal out of time in reliance on *Barder*.

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WA v EXECUTORS OF ESTATE OF HA (DEC'D) [2016] 1 FLR 1360 (Cont.)

- W argued the lump sum was awarded to H to meet his needs which basis had been invalidated by his death.
- H's estate argued his death was not unforeseeable (as he had taken the separation very badly) and also that his award was not only needs based, but that he was also entitled to a share of W's resources.
- W's appeal allowed, reducing lump sum to H to £5m.

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WA v EXECUTORS OF ESTATE OF HA (DEC'D) [2016] 1 FLR 1360 (Cont.)

- W had succeeded in meeting the *Barder* test as the fundamental assumption was that H had needs for housing and income in the long-term, which had been invalidated by his very early death.
- If his death had been foreseen, a nil award would have been wrong. The Court would have considered sharing and need leading to an award where H had a month to live.
- H should have received an award of one third of the value of the matrimonial property (which came entirely from W), namely £5m, taking into account H's contribution as husband and father.
- H's original award had been mostly needs-based, however, and was susceptible to being set aside pursuant to *Barder*.

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Critchell v Critchell [2016] 1 FLR 400

Death of Third Party as Barder Event

- Only asset of marriage was FMH worth £175,000. Consent order transferring FMH to W subject to 45% charge in favour of H realisable on Mesher terms.
- Within a month of the consent order, H's father died leaving him a sum of money. W appealed alleging the receipt of the inheritance was a Barder event undermining the basis of the consent order.
- CA held that H's receipt of an inheritance so soon after the hearing represented a change in the basis, or fundamental assumption, upon which consent order had been made. Mesher order was no longer necessary.
- CA highlighted that original order was needs-based and if more resources available, needs could be provided for more fully and no need for Mesher.

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Appeal / Set Aside and Conclusion

- *Barder* and subsequent cases were appeals out of time.
- Since FPR PD 9A paragraph 13 was amended, such an application should be made to the first instance judge, and not the appeal court.
- A *Barder* event is only likely to be arguable where the original award was needs-based and the need no longer exists.
- Where a *Barder* event is established, then the award to the deceased will be presumed to meet their needs for the time they remained alive, and will take into account any contributory factors.


LAW

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Inheritance Act claims where death occurs before / after order made

Mark Dubbery

75 years

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PROCEDURE

Who may claim s1(1)?

- Spouse.
- Former Spouse – but NB s.15 (**Chekov v Fryer [2015] EWHC 1642 (Ch))**.
- 'Cohabitee' (qualification can be complex) **Gully v Dix [2004] 1 WLR 1399, Kaur v Dhaliwal [2014] EWHC 1991**).
- Child (NB *not* limited to minor children).
- 'Step-child' (likewise).
- 'Other dependants'.

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Important Consideration under the 1975 act

14 Provision as to cases where no financial relief was granted in divorce proceedings etc.

1. Where, within twelve months from the date on which a decree of divorce or nullity of marriage has been made absolute or a decree of judicial separation has been granted, a party to the marriage dies and—

   a) an application for a financial provision order under section 23 of the Matrimonial Causes Act 1973 or a property adjustment order under section 24 of that Act has not been made by the other party to that marriage, or

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Important Consideration under the 1975 act

then, if an application for an order under section 2 of this Act is made by that other party, the court shall, notwithstanding anything in section 1 or section 3 of this Act, have power, if it thinks it just to do so, to treat that party for the purposes of that application as if the decree of divorce or nullity of marriage had not been made absolute or the decree of judicial separation had not been granted, as the case may be.

(2) This section shall not apply in relation to a decree of judicial separation unless at the date of the death of the deceased the decree was in force and the separation was continuing.

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Is a s.15 order always fatal?

Chekov v Fryer [2015] EWHC 1642 (Ch).

*…any person (**not being a person included in paragraph (a) or (b) above**) to whom subsection (1A) applies…*

S 1(1)(ba) is

*…a **former spouse** or former civil partner of the deceased, but not one who has formed a subsequent marriage or civil partnership*

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What is the burden on the Claimant (s1(1))?

…that person may apply to the court for an order under section 2 of this Act on the ground that 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 not such as to make reasonable financial provision for the applicant.

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What is 'reasonable financial provision' (s1(2))?

Spouse or Civil Partner (s1(2)(a)):

…such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance.

All Other Claimants (s1(2)(b) (subject to s.14))

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

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Section 3
The general considerations

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;*

NB the interplay of multiple applications. The powers under s2(4).

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;*

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Section 3
The general considerations

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;*

Widows and Minor children obviously important but also cohabitees placed in a position of dependency see e.g. **Negus v Bahouse [2007] EWHC 2628**.

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

Matrimonial and Quasi-matrimonial homes.

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Section 3
The general considerations

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.*

Conduct is a high bar but powerful in the right case (which is easy to remember being Wright v Waters [2014] EWHC 3614).

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What are the specific considerations?

Spouse (s3(2)):

a) *the age of the applicant and the duration of the marriage or civil partnership;*

b) *the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.*

AND…

"The Divorce Hypothesis"

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What are the specific considerations?

Cohabitee (s3(2A)):

a) *the age of the applicant and the length of the period during which the applicant lived as the husband or wife or civil partner of the deceased and in the same household as the deceased;*

b) *he contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.*

Child (s3(3)):

…the manner in which the applicant was being or in which he might expect to be educated or trained…

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What are the specific considerations?

Cohabitee (s3(2A)):

a) *the age of the applicant and the length of the period during which the applicant lived as the husband or wife or civil partner of the deceased and in the same household as the deceased;*

b) *he contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.*

Child (s3(3)):

…the manner in which the applicant was being or in which he might expect to be educated or trained…

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What is reasonable provision for a spouse?

P v G, P and P (Family Provision: Relevance of divorce provision) [2006] 1 FLR 431

"I am struck by the force of the repeated observations in the decided authorities about the difference between divorce where there are two surviving spouses for whom to make provision and death where there is only one. It seems to be probable that this difference will not infrequently be reflected In greater provision being made under the 1975 Act than would have been made on divorce and that this may legitimately be so even where the estate is a relatively large one as it is here".

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What is reasonable provision for a spouse?

Fielden v Cunliffe [2006] Ch 361 (1 year marriage) Wall LJ:

> *"Caution, however, seems to me necessary when considering the White v White cross check in the context of a case under the 1975 Act. Divorce involves two living spouses, to each of whom the provisions of s.25 of the MCA 1973 apply. In cases under the 1975 Act, a deceased spouse who leaves a widow, is entitled to bequeath his estate to whomsoever he pleases; his only statutory obligation is to make reasonable financial provision for his widow. In such a case, depending upon the value of the estate, the concept of equality may bear little relation to such provision".*

- Also helpful comments re relevance of short marriages

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What is reasonable provision for a spouse?

Iqbal v Ahmed [2011] WTLR 1351, EWCA Civ 900

- Small Money case.
- Importance of Matrimonial Home.
- Good illustration of the greater provision under 1975 Act.

Lilleyman v Lilleyman [2012] Ch 225

- Ringfencing of pre-acquired assets.
- Importance of standard of living.
- Careful application of the 'divorce hypothesis' by a Chancery Judge.
- Burden of CPR Part 36.

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What is reasonable provision for a spouse?

Berger v Berger [2013] EWCA 1305

- Life interest with power to advance capital may not be reasonable financial provision.

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What is reasonable provision for a cohabitee?

- Negus v Bahouse (supra)
- Holliday v Musa & others [2010] WTLR 839
- Lewis v Warner; Warner v Lewis [2017] EWCA Civ 2182
- Martin v Williams [2017] EWHC 491 (Ch)
- Thompson v Raggett [2018] EWHC 688 (Ch)

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What is reasonable provision for a child?

Adults:

Ilott v Blue Cross [2017] UKHL 17

- Adult children and generally on ‘maintenance’.
- Wide margin of discretion/application of value judgment.
- The strength of the Defendant’s position.
- Importance of focus in maintenance claims.

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The 'tariff' approach?

- **Nahajec v Fowle (Leeds County Court 18th July 2017)**

- **Wellesley v Wellesley, 8th Earl Cowley & Ors. [2019] EWHC 11 (Ch).**

Minors:

- **Ubbi & Ubbi v Ubbi [2018] EWHC 1396 (Ch)**

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Time Limit:

S.4: "*An application for an order under s.2 of this Act shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out*" – this provision is currently the subject of some uncertainty as a result of the decisions in Bhusate v Patel & Ors. [2019] EWHC 470 (Ch) and Cowan v Foreman & Others [2019] EWHC 349 (Fam) but it is unlikely to be an issue in the context of this evening's seminar.

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Domicile:

(subject of a separate talk but very important).

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Claim Form:

CPR Parts 8 and 57 set out the key considerations:

- NB evidence must be filed with the claim form, there is a 'right to reply'.
- Who to add as Defendants?
- Choice of County Court or High Court.
- Choice of Family or Chancery Division, widows' claims usually proceed in Fam.
- Are there other issues that are not suited to Part 8? Constructive Trust or PE?
- Can one avoid duplication of claim forms? Bhusate v Patel & Ors. [2018] EWHC 2362 (Ch)

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Issue Before Grant:

- CPR Part 57.16(3A) specifically enables a claimant to make a claim without having exhibited an official copy of a grant and enables a claimant in such a case to make a claim without naming a defendant and to apply for directions as to the representation of the estate. It will, one would think, be rare that such a course would be necessary or desirable as the beneficiaries will be Defendants in any event.
- NB: an order for representation of the estate in the proceedings is not the same as a grant.

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When Does Time Expire?

Although by CPR 7.2(1) & (2) the proceedings are started when the court issues the claim form, by the Practice Direction to CPR Part 7 at paragraph 5.1:

> *"where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is "brought" for the purposes of the Limitation Act 1980* ***and any other relevant statute*** *on that earlier date*

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Pre-Action and Interim Applications

Early consideration should be given to:

1. Registering the claim as a pending land action (unilateral notice or land charge);
2. The flip side of this is Williams v Seals 2014 EWHC 3708;
3. Seek undertakings that no part(s) of the estate will be distributed until resolution of any claims;
4. Apply under CPR part 25 for a freezing injunction;
5. Pre-claim disclosure CPR Part 25.1(1)(g);

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Pre-Action and Interim Applications

6. Powers under 1975 Act sections 10, 11, 12 and 13 in relation to disposition or contracts made with the intention of defeating claims under the 1975 Act;
7. Powers to remove personal representatives (or trustees) (CPR Part 57);
8. Power to order an account and inventory.
9. Interim Provision but see **Smith v Smith [2011] EWHC 2133**

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ADR

- The prominence of mediation.
- The difference between family and civil mediation, what to expect.
- The costs consequences of refusing mediation – the Practice Direction on Pre-Action Conduct.
- Other pre-action requirements: letters of claim, disclosure, experts.
- The availability of ENE/FDR in 1975 Proceedings.

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Costs

- At large in the proceedings.
- The importance of Part 36 – the cautionary tale of **Lilleyman v Lilleyman [2012] EWHC 821**.
- The role of executors.

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Costs Budgeting and 1975 Act claims

CPR PD6E(5) *below* and F.

An order for the provision of costs budgets with a view to a costs management order being made may be particularly appropriate in the following cases:

…

applications under the Trusts of Land and Appointment of Trustees Act 1996;

applications under the Inheritance Provision for Family and Dependants) Act 1975;

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INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

PRACTICAL CONSIDERATIONS INCLUDING BACKGROUND, PROOF OF DEATH & DOMICILE

Julian Reed

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Testamentary Freedom

- The law enables a testator to have freedom to dispose of his estate as he desires on his death by his Will, subject to statutory provisions relating to testamentary capacity and the formal requirements regarding a valid Will.
- ***Ilott v Blue Cross [2017] 2 WLR 979.***
- Inheritance (Provision for Family and Dependants) Act 1975 ("*I(PFD)A*"), which came into force on 1st April 1976

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I(PFD)A Developments

The I(PFD)A has been amended by 4 further Acts, namely:

- The Law Reform (Succession) Act 1995
- The Civil Partnership Act 2004
- The Marriage (Same Sex Couples) Act 2013
- the Inheritance and Trustees' Powers Act 2014.

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POTENTIAL APPLICANT'S

a) the deceased's spouse or civil partner
b) former spouse or civil partner of the deceased who has not formed a subsequent marriage or civil partnership
c) cohabitant who has lived as such with the deceased for 2 years immediately before the deceased's death
d) child of the deceased (including adult children)
e) person treated as a child of the family in relation to any marriage or civil partnership of the deceased
f) a dependant of the deceased.

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INITIAL PRECONDITIONS

- An application for financial provision may only be brought against the estate of a deceased person who is domiciled in England & Wales at the time of his death – S.1(1).
- Proof of death and domicile of the deceased are the initial preconditions, which a claimant must establish when applying for financial provision.

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PROOF OF DEATH

- Death is proved by producing a certified copy of the deceased's death certificate.
- When a person has died in active service with the Armed Forces a death certificate is issued by the Ministry of Defence.
- Presumption of Death Act 2013, (in force from 1st October 2015) enables the High Court to make a declaration if it is established that the missing person is thought to be dead or has not been known to be alive for a period of at least 7 years.

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DOMICILE

- English law requires everyone to have at all times a domicile – ***Udny v Udny.***
- Domicile is a precondition to a I(PFD)A claim.
- It is based on where a person has his permanent home.
- It is not the same as ordinary residence or habitual residence.
- Determining domicile – is to identify which legal system applies to deceased's estate

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CRITICS

- Every individual is regarded as belonging
- Legal idea may not correspond to social reality
- Social changes, globalisation and freedom to move between countries, since the introduction of I(PFD)A underline criticisms
- ***Cyganik v Agulian and another.***

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TYPES OF DOMICILE

- 3 types of domicile:
  - domicile of origin
  - domicile of dependency
  - domicile of choice.

- Whether an application under the I(PFD)A is prohibited is determined in accordance with the law of England & Wales.

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DOMICILE OF ORIGIN

- It is assigned to every person at his birth.
- It is that of his father, if he is legitimate and born in his father's lifetime.
- It is that of his mother if illegitimate.
- Adopted children will have the domicile of his adopted parents.
- Persists during the lifetime or until he acquires a new domicile.

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DOMICILE BY DEPENDENCY

- Child under 16, or a person lacking mental capacity, has a domicile of dependency - that of his parents.
- If the father acquires a domicile in another country the child automatically acquires a domicile of dependency in that country.
- Once 16 he is able to acquire a domicile of choice independently of his parents.
- A person who lacks mental capacity, probably retains the domicile which he had when he became incompetent.

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DOMICILE OF CHOICE

Acquired when a person leaves his domicile of origin and moves to live in a country of choice with the intention of residing there permanently or indefinitely.

2 requisites must be satisfied:

i) residence actually in the country of choice;

ii) intention to live there permanently.

Both must be established for a domicile of choice to be acquired.

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RESIDENCE

If a person intends to change his domicile of origin, then it is necessary for him to live in the country of his choice.

Intention without residence is insufficient - ***Harrison v Harrison***.

Duration of residence or his motive for change is immaterial, provided that it is accompanied by the necessary intention to live in that country permanently or indefinitely.

The intention of residence must be fixed and must be for the indefinite future.

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INTENTION

- If an individual resides in a particular country but has not made up his mind as to which country is to be his permanent residence, he does not acquire a domicile of choice in that country - ***Re Patience***.
- ***Cyganik v Algulian*** – look at all the facts.
- ***Morris v Davies –*** living in France for work purposes.

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Barlow Clowes International Limited (In liquidation) v Hemwood

Arden LJ guidance para 8:

i) Every person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise.

ii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice.

iii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious.

iv) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely not otherwise.

v) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but, if it is not acquired, the domicile of origin revives.

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STANDARD OF PROOF

- The grant of representation may state that the deceased died domiciled in England & Wales. Such a statement is not conclusive.
- Claimant must establish that the deceased was domiciled in England & Wales - ***Mastaka v Midland Bank Executor and Trustee Co Ltd***
- Civil standard of proof - balance of probabilities.

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EVIDENCE

The evidence must be clear, cogent and convincing - ***Re Fulds Estate (No 3), Hartley v Fuld***.

The deceased's written declarations, made during his lifetime or by Will as to his domicile are admissible in evidence (Civil Procedure Rules 33.3), but are not conclusive.

Contrast fact specific authorities.

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RELEVANT FACTORS FOR CONSIDERATION

The relevant factors, relating to the deceased, that may be considered include, but are not limited to:

- The time he has spent in a country;
- His citizenship or nationality;
- Any change in citizenship or nationality;
- His age;
- Business interests or commitments;
- Where he may own property;
- Choice of language;
- Religious beliefs;
- The form and content of any Will that he may have made;
- The degree of assimilation in a new country;
- What he may have said or written during their lifetime.

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OVERVIEW

- Cases are fact specific – there is a need to carefully consider the details.
- Domicile of origin will prevail, unless evidence is strong enough to show that a domicile of choice has been acquired and retained.
- A lengthy period of residence, without evidence of the deceased's intention to abandon domicile of origin and remain in his country of choice, will not lead to the deceased acquiring a domicile of choice. Intention must be established.
- Domicile of choice requires evidence of the deceased's intention to live permanently and indefinitely in England & Wales. The circumstances up until death ought to disclose no indecision or that he has not made up his mind.

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OTHER PARTS OF THE UNITED KINGDOM

I(PFD)A does not extend to the Channel Islands,

I(PFD)A does not extend to Scotland or Northern Ireland - Section 27(2

In Northern Ireland the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979, S1 1979/924, applies to deaths of individuals domiciled in Northern Ireland on or after 1 September 1979.

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