PUMP COURT

CHAMBERS

DEATH OF A FORMER SPOUSE

Helen Brander

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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).

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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).

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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.

PUMP COURT CHAMBERS

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.

PUMP COURT CHAMBERS

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).

PUMP COURT
CHAMBERS

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.

PUMP COURT CHAMBERS

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."*

PUMP COURT
CHAMBERS

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

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*.

PUMP COURT CHAMBERS

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.

PUMP COURT CHAMBERS

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*.

PUMP COURT
CHAMBERS

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.

PUMP COURT CHAMBERS

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