

**Inheritance Act claims where death occurs before / after order made**

**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’.

**Important Consideration under the MCA 1973:**

**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*
- b) such an application has been made but the proceedings thereon have not been determined at the time of the death of the deceased,*

*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.*

**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*

**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.*

**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.*

**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;*

(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.

(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**).

**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”

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) *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.*

Child (s3(3)):

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

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”.*

**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.

**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.

**Berger v Berger [2013] EWCA 1305**

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

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)**

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.

**The ‘tariff’ approach?**

- **Nahajec v Fowle (Leeds County Court 18<sup>th</sup> July 2017)**
- **Wellesley v Wellesley, 8<sup>th</sup> Earl Cowley & Ors. [2019] EWHC 11 (Ch).**

**Minors:**

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

**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.

**Domicile:** (subject of a separate talk but very important).

**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)

**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.

**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.”*

**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);
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**



### 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.

### **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.

### **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 Dependents) Act 1975;*

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