PUMP COURT

CHAMBERS

When the Wife Becomes a Widow
A joint Inheritance & Family Finance Seminar

Tuesday 16th July 2019

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Schedule

17.30 – 18.00	Registration
18.00 – 18.30	**When the wife becomes the widow: Financial remedy and Inheritance Act claims** Edward Boydell
18.30 – 18.45	**Death of a former spouse** Helen Brander
18.45 – 19.15	**Inheritance Act claims where death occurs before / after order made** Mark Dubbery & Tara Lyons
19.15 – 19.30	**Domicile issues in Inheritance Act claims** Julian Reed

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Family Finance

With 47 members Pump Court Chambers has one of the largest specialist family finance teams of any set at the Bar. Our Family Finance Team, headed by Edward Boydell, is home to six recognised Chambers and Partners "Leaders at the Bar" and is consistently ranked first on the Western Circuit for family finance. We have two Queen's Counsel and 47 juniors specialising in family finance and are home to a Deputy High Court Judge, a number of Recorders and Deputy District Judges sitting on Circuit and at the Central Family Court.

The spectrum of work undertaken by our barristers covers the full range of family finance from complex high net worth "Big Money" cases to those cases with more modest assets and incomes. The team has experience and expertise of appearing in courts at all levels from Family Court, the High Court and the Court of Appeal. The type of work we do includes:

- Injunctive relief and worldwide freezing orders
- Cases involving farms and family businesses
- Cases involving trusts including offshore trusts
- Cases involving bankruptcy and liquidation
- Nuptial agreements
- Financial claims following overseas divorces
- Property claims between unmarried and same sex couples including TOLATA claims
- Divorce proceedings
- Financial remedies on the dissolution of Civil Partnerships
- Trusts of Land disputes and equitable co-ownership

We provide in-house seminars and continuing professional education through our own training programme and in conjunction with other providers such as local Resolution groups, Central Law Training, Cpdcast and Datalaw.

Many members of the team are also qualified family arbitrators and civil mediators. They are available to conduct Private FDRs (or 'early neutral evaluations') and Financial Remedy Arbitrations.

Sean Gentleman, our senior Team Clerk, has a commercial approach to fee negotiation and is willing to discuss progressive fee arrangements to suit differing client and case needs. If you wish to discuss bespoke fee structures or arrange a seminar Sean can be contacted via email: s.gentleman@pumpcourtchambers.com or by telephone on 020 7353 0711.

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Inheritance, Wills & Probates

The Pump Court Inheritance Wills and Probate Team provides specialists in resolving inheritance related problems. Advocacy services have always been at the heart of the work done by the team and we pride ourselves on providing a service that is friendly towards those who are suffering the trauma of bereavement compounded by family dispute. Members have been selected for their ability to deal tactfully with both client and opposition alike. All are skilled in modern methods of Alternative Dispute Resolution as well as being experienced, and if required robust, advocates. Several members of the team are qualified civil mediators and members of the Pump Court Inheritance Mediation service that provides specialist mediators to help resolve these disputes. We also provide arbitration services in Inheritance Act disputes.

The scope of the specialist work of the team includes:

- Claims under the Inheritance (Provision for Family and Dependants) Act 1975
- Probate claims- contentious and non-contentious
- Rectification of wills
- Proprietary estoppel and constructive trust claims
- Removal of personal representatives
- Undue influence claims – especially those involving the elderly and vulnerable
- Mental Capacity
- Court of Protection – financial and welfare issues
- Professional negligence claims involving wills and estates
- Trusts of Land disputes and equitable co-ownership

Jon Cue is the Senior Clerk to our civil team and can be contacted by phone on 0207 353 0711/01962 868 161 or by email at j.cue@pumpcourtchambers.com

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Leslie Samuels QC

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Silk 2011
Call 1989

Leslie Samuels QC is an exceptional advocate and is held in high esteem for his expertise in financial remedies cases and in inheritance and probate disputes. In 2012 he was appointed as a Family Recorder on the South Eastern Circuit (sitting in the FRU at the CFC) and in 2016 he was appointed as a Deputy High Court Judge sitting as a s.9 Judge of the Family Division at the RCJ. He is recommended in the Chambers & Partners and Legal 500 directories and has been ranked in these directories for many years. Within Chambers Leslie is Head of the Children Team and the Civil Team. He is an ADR qualified mediator and an IFLA trained arbitrator.

Edward Boydell

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Call 1989

Edward is highly experienced in all aspects of family law but particularly financial remedies (including civil partnerships). He has specific expertise in dealing with complex high net worth matters involving family businesses, farms, companies and trusts. He is also very experienced in equitable co-ownership and cases under TOLATA Particularly well known for his family finance work and recognised as one of the "Leaders at the Bar", he has been listed in Band One by Chambers & Partners for over 10 years and is listed in the Legal 500. Edward also sits as a Recorder with tickets in all family jurisdictions including financial remedy applications and appeals.

Mark Dubbery

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Call 1996

Mark is the Head of the Inheritance, Wills and Probate Team: Mark is regularly instructed in claims pursuant to the Inheritance (Provision for Family and Dependants) Act 1975 and other contentious probate matters, claims for rectification of wills, administration actions and applications to remove or replace executors. Many claims involve issues of proprietary estoppel, constructive trusts and/or undue influence.

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Julian Reed

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Call 1991

Julian Reed practices in the areas of family and civil law, specialising in areas where the two disciplines overlap. He has a substantial financial provision practice dealing with businesses, farming disputes, companies and partnerships His practice includes contentious probate matters, acting for both claimants and defendants (including executors) in cases involving the Inheritance (Provision for Family and Dependents) Act 1975.

Helen Brander

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Call 2002

Helen Brander has extensive experience in all aspects of family law and specialises in family finance, inheritance and probate disputes, and disputes concerning children. She is able to advise, assist and provide representation at any stage of proceedings and welcomes requests for initial advice. She is a firm believer in the benefits of alternative dispute resolution, including mediation and early neutral evaluations / non-court dispute resolution appointments, and is a trained arbitrator under the IFLA (Children) scheme.

Tara Lyons

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Call 2005

Tara Lyons is a specialist family and civil law practitioner and is ranked both in Chambers & Partners and Legal 500. She represents a range of litigants and is instructed to appear in courts and tribunals at all levels up to and including the Court of Appeal. Tara has significant experience for her call in matrimonial finance and cases concerning financial provision for children under Schedule 1 of the Children Act 1989 both at first instance and on appeal. Tara regularly receives instructions in claims concerning the Inheritance (Provision for Family and Dependants) Act 1975, contentious probate matters, disputes about validity of wills and administration issues. She represents a range of litigants including children at mediation and at court in both the County and High Court.

Tudor v Tudor

Catherine and Henry Tudor married in 1993. Catherine had previously been engaged to Henry's elder brother Arthur, who sadly died during his stag party. Henry and Catherine married about 3 years later, united in their grief. Catherine moved to the UK permanently from Spain to marry Henry.

During the marriage Catherine and Henry underwent lengthy IVF treatment but only managed to have one child, Mary. Mary was born 7 years after the marriage. She is now 19 and in her first year reading Medieval History and Kingship at Queens' College, Cambridge. She is considering undertaking a law conversion course thereafter.

Catherine is now 54 years old. As a result of the lengthy IVF programme which Catherine and Henry continued until she was in her early 40s, Catherine's career as a bilingual teacher was sporadic. She is working only 6 hours pw during term time teaching Spanish at Cardinal Vaughan School.

Henry is the CEO of a headhunting company, Tudor & York Ltd. He is now 45 years old. He is the majority shareholder. The other 3 minority shareholders are junior family members. Henry inherited his shares on the death of his father (also Henry), which was shortly after the marriage. Catherine never worked for the company.

In 2017, suspecting that Henry might be having an affair, Catherine activated the "Find My Friends" feature on Henry's iPhone, unbeknownst to him. Over the next few weeks by monitoring his whereabouts she saw that he was spending suspiciously lengthy periods at the property of his chief designer, Anne. Anne is 35 and, as far as Catherine knows, has never been married.

In her anger at the discovery of the affair, Catherine drove one evening to Anne's cottage and confronted Anne and Henry in circumstances where it would be impossible for them to deny their relationship. Having expressed her anger in terms liberally punctuated with Spanish invective, Catherine drove home. Later that night she received a call from a local hospital to say that Henry had been involved in a car accident. It later transpired that Henry was not responsible for the accident, which was caused by a drunk driver leaving the car park of "*The Wrong'd Wyfe*" public house next door to Anne's cottage.

Henry sustained serious head and pelvic injuries. A report obtained for the financial remedy proceedings recorded that:

- He suffered a closed head injury with some mild traumatic brain damage which affects his reasoning and ability to sequence. He fatigues easily;
- He has an increased risk of epilepsy;
- He sustained fractures to both sides of his pelvis and his left knee which has significantly reduced his mobility. He can use crutches now but is likely to be

wheelchair bound within 10 years.
- He sustained significant damage to his spleen, which was then removed;

The report concludes that deterioration following the head injury is likely to lead to Henry's working life ceasing in c10 years and his life expectancy being reduced by c10 years.

Henry never returned to the FMH but with Anne's love and care recovered well. He returned to work some 12 months later by which time Catherine had initiated divorce proceedings.

During his convalescence Henry lived with Anne at her cottage. Anne gave up her job and provided the majority of his care.

Mary visited him occasionally, usually to discuss her own financing but otherwise struggled to cope with the discovery of her father's adultery.

Catherine issued Form A at around the time Henry returned to work. The proceedings required an FDA and an FDR and the final hearing was listed about a year later. By this time Henry had been back at work for a year, but was struggling to cope with the travel and was increasingly fatigued due to his brain injury.

The agreed schedule prepared by efficient counsel recorded that the principal assets for distribution are:

- Equity in the FMH, 1 Whitehall Palace Gardens, of c£500,000 now held by the parties as tenants in common.
- Henry's shares in Tudor & York worth c£1m gross. Henry is entitled to entrepreneur's relief.
- A pension held with Fidelity worth £400,000
- A sum of c£150,000 being damages recently received by Henry for his car accident. £70,000 represented loss of earnings, £40,000 for pain, suffering and loss of amenity and £30,000 for adaptations and mobility support. The balance was interest and other consequential loss including £3,000 for past care.
- Catherine has a part share in a property in Aragon, Spain inherited from her father 18 months before their separation and worth c€200,000. Her sister lives in that property.
- Henry is earning c£80,000 pa net from a combination of salary and dividend income.
- Catherine has no other assets and is earning c£6,000 pa. She is unlikely to earn more.

The final hearing was heard over three days in the FRU. During his cross-examination Henry was closely questioned as to payments from his account to an account in the name of Boleyn, which is Anne's surname. After some prevarication and obfuscation Henry confirmed that they were not payments to Anne but to her elder sister, Jane. After further questioning Henry disclosed that some years before his relationship with Anne he had a one-night stand with her sister Jane and that his son, Hal, was born as a result. Henry has been providing modest support for Hal since his birth. Hal is now 9 years old and has spina bifida.

DJ King reserved her judgment and later sent out a draft judgment for counsel to provide corrections. After these were provided, the judgment was released to the parties. A date was set for judgment to be handed down two weeks later.

By her unsealed judgment DJ King determined that:

- The FMH be sold forthwith and the net proceeds divided as to 60% to Catherine and 40% to Henry;
- Henry should pay a lump sum of £50,000 to Catherine (from which her outstanding legal costs of £30,000 would be paid);
- Henry should pay Catherine PPs during their joint lives at the rate of £30,000 pa reducing to £0.05 on her 67th birthday (when Henry 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
- The judge found that although Henry's interest in T&Y was worth £1m gross there was little liquidity in the company but that it would produce an income stream for Henry of £80,000 net pa
- She specifically stated that she was not making any order as to Henry's shares in T&Y on the basis that if he sold them Catherine might apply to capitalise her maintenance.
- There be a pension sharing order to balance their pension benefits by capital value.
- She found that the Spanish property was a non-matrimonial asset.
- She ordered Henry to pay Mary's future education costs whilst she completes her first degree.

Unfortunately, later that evening Henry suffered an epileptic fit and despite Anne's attempts to revive him, he died. By the date of his death Anne and Henry had been living together for 28 months.

At the time of Henry's death there had been no decree absolute.

Henry had written a new will shortly before the final hearing. He had left his estate in three parts. One part was left to Anne for life but on her death reverting to his two children in equal shares. A third was left to Mary but on trust until she attains the age of 25 years. A third is left on trust for Hal, with Anne and Jane as the trustees.

Four weeks after Henry's death, Anne discovers she is pregnant. Their daughter Elizabeth was born 7 months later.

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

EDWARD BOYDELL

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

Between

CATHERINE TUDOR

Petitioner

and

HENRY TUDOR

Respondent

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When the wife becomes the widow

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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When the wife becomes the widow

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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When the wife becomes the widow

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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When the wife becomes the widow

- 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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When the wife becomes the widow

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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When the wife becomes the widow

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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When the wife becomes the widow

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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When the wife becomes the widow

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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When the wife becomes the widow

- 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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When the wife becomes the widow

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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When the wife becomes the widow

- 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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When the wife becomes the widow

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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Edward Boydell
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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.

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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.

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.

Helen Brander
Pump Court Chambers
July 2019 ©

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 18th July 2017)**
- **Wellesley v Wellesley, 8th 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 Dependants) Act 1975;*

Mark Dubbery
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July 2019 ©

Domicile issues in Inheritance Act claims

Introduction

The law in England and Wales enables a testator to have freedom to dispose of his estate as he so desires on his death by his Will, subject to certain statutory provisions relating to testamentary capacity and the formal requirements regarding the making of a valid Will. If the deceased's Will is proved to be valid, the deceased's estate will devolve in accordance with the terms of his last Will. If on the other hand a person has not made a valid Will, or made no Will at all, the estate will devolve in accordance with the law of intestacy. There may be cases where the residuary estate has not been disposed of by the terms of the Will, whereby the estate will be distributed under the terms of the Will in so far as it validly applies and the remainder will pass under the law of intestacy.

The above proposition was and remains the characteristic feature of English testamentary law - ***Ilott v Blue Cross [2017] 2 WLR 979.***

The Inheritance (Family Provision) Act 1938, provided for the maintenance of dependants out of the estate of the deceased, if reasonable financial provision was not made for them under the Will. Since the 1938 Act various statutes have encroached on testamentary freedom, empowering the court to make orders for financial provision out of the deceased's estate for a spouse of the deceased and other classes of persons identified as eligible to receive such provision.

The Matrimonial Causes Act 1965, made inroads into restricting the freedom of a testator where proper financial provisions had not been made for a former spouse, by virtue of Sections 26-28. It enabled the former spouse to apply to the court for an order for maintenance to be provided from the deceased's estate.

The Inheritance (Provision for Family and Dependants) Act 1975 ("*I(PFD)A*"), which came into force on 1st April 1976 (Section 27(3), repealed the 2 earlier enactments. It extended the category of persons who can make an application for financial provision out of the estate of a deceased person. It empowered the court to make wide ranging orders to meet the needs of the claimant where the criteria set out in I(PFD)A have been met.

Subsequent Amendments

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

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

The Law Reform (Succession) Act 1995 extended the classes of person eligible to make claims for financial provision where the deceased died on or after 1st January 1996, to include any person (not the spouse or former spouse of the deceased) who during the 2 years immediately preceding the deceased's death, had been living with the deceased in the same household as the deceased and as the husband or wife of the deceased.

The Civil Partnership Act 2004, which came into force on 5th December 2005, extended the category of those who have a right to make a claim, to include same sex couples in respect of deaths after 5th December 2005. Pursuant to Schedule 4 paragraph 6 of the Civil Partnership Act 2004 a surviving civil partner may be granted probate and letters of administration over the Public Trustee under the Public Trustee Act 1906. Schedule 4, paragraphs 7-14 also amends the Administration of Estates Act 1925, the Intestates' Estates Act 1952 and the Family Provisions Act 1966 so as to give the surviving civil partner the same status as a surviving spouse.

The Inheritance and Trustees' Powers Act 2014, took effect from 1st October 2014 although the provisions are not retrospective. Schedule 2 set out the amendments to the I(PFD)A. The most significant reforms relate to:

i) time limits for bringing claims for financial provision and in respect of Section 9 of I(PFD)A which allows the deceased's severable share in property held under a joint tenancy to be treated as part of the net estate of the deceased;
ii) the extension of Section 1(1)(d) to include single parent families;
iii) the removal in Section 1(3) of how the respective contribution of the deceased and the claimant is assessed in cases where the claimant is a person (not being a person included under any of the other categories set out in Sections 1(1)(a)–(d)) who immediately prior to the deceased's death was being maintained either wholly or partly by the deceased;
iv) the matters which the court must consider under Section 3 when considering I(PFD)A claims.

Who can claim?

I(PFD)A empowers the court to make orders for the taking out of the estate of a deceased person of provision for prescribed classes of persons. It is important to know who can make claims, thus it is necessary to consider the entitlement to claim conferred by Section 1.

Section 1(1) provides that
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—

(a) the spouse or civil partner of the deceased;
(b) a former spouse or former civil partner of the deceased, but not one who has formed a subsequent marriage or civil partnership;]
(ba) any person (not being a person included in paragraph (a) or (b) above) to whom subsection (1A) [or (1B)] below applies;]
(c) a child of the deceased;
(d) any person (not being a child of the deceased) [who in relation to any marriage or civil partnership to which the deceased was at any time a party, or otherwise in relation to any family in which the deceased at any time stood in the role of a parent, was treated by the deceased as a child of the family];
(e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;

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."

Thus, whether the Deceased dies testate or wholly or partly intestate, after his death, the court has power to order provision to be made out of the Deceased's net estate for certain applicants. The potential applicants are a) the deceased's spouse or civil partner, b) a former spouse or civil partner of the deceased who has not formed a subsequent marriage or civil partnership, c) a cohabitant who has lived as such with the deceased for two years immediately before the deceased's death, d) a child of the deceased (including adult children), e) a person treated as a child of the family in relation to any marriage or civil partnership of the deceased; and f) a dependant of the deceased.

Initial Preconditions

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

If the deceased died domiciled elsewhere than in England and Wales, a claim under the I(PFD)A cannot be entertained by the court. Issues may be taken by a defendant, who intends to resist a claim, as a preliminary issue.

Proof of death

Death is proved by the claimant producing a certified copy of the deceased's death certificate. A copy may be obtained from the registrar for the sub-district in which the death occurred or the body was found. It can be ordered online at www.gov.uk/order-copy-birth-death-marriage-certicate.

The applicant will need to provide the deceased's full name, place and date of his or her death and the usual address of the deceased if different from the place of death.

Where the death occurred overseas, death can be registered at a British Consulate or the British High Commissioner and the Foreign and Commonwealth office overseas registration unit.

A death certificate for a person who has died in active service with the Armed Forces is issued by the Ministry of Defence. This will be in the form of a notification of death or presumed death. In the event of the death of a merchant seaman, the Registrar General of Shipping and Seaman are responsible for providing a certificate of evidence of death.

The Presumption of Death Act 2013, which came into force on the 1st October 2015, confers upon the High Court the right to grant a declaration, provided it can be 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. The Presumption of Death Act 2013 applies to England and Wales.

The Civil Procedure Rules Part 57 provide the procedure to be followed, namely the issue of a claim form in accordance with Part 8 (Rule 57.19), in the High Court (Rule 57.18) either the Chancery or the Family Division.

The Presumption of Death Act 2013, Section 1(5) provides that: *"The court must refuse to hear an application under this section if—*
(a) the application is made by someone other than the missing person's spouse, civil partner, parent, child or sibling, and
(b) the court considers that the applicant does not have a sufficient interest in the determination of the application."
Accordingly, there will need to be good reasons for personal representatives, who are not within one of the categories, to make an application.

If the declaration is made, it will be served on the register general for England and Wales for registration, and once registered will serve as "*conclusive proof of the missing persons death and the date and time of death*". Certified copies of entries in the register issued by the registrar general will be treated as evidence of the missing persons death. The missing person's property will pass to others in the same way as if the missing person had died. When making the declaration, the court has power to determine any issue relating to an interest in any property and the domicile of the missing person at the time of his presumed death (Section 7)

Domicile

English law requires every person to have at all times a domicile – ***Udny v Udny [1869] LR 1.***

Domicile is a precondition to any claim under the I(PFD)A. Domicile is based on where a person has his permanent home. It is not the same as a person's ordinary residence or habitual residence. Freedom of movement between countries means that people now live, work and have homes and business in countries other than the country of their nationality.

The primary purpose of determining domicile is to identify which legal system should be applied to the deceased's estate. Domicile defines the legal relationship between the individual and that legal system which is invoked as his personal law - ***Henderson v Henderson [1965] 1 All ER 179*** *(at 180-181).* Sir Jocelyn Simon P held:

"Domicil is that legal relationship between a person (called the propositus) and a territory subject to a distinctive legal system which invokes the system as the personal law of the propositus and involves the courts of that territory in having primary jurisdiction to dissolve his marriage. (I use the male gender for convenience, though every person of either sex has a domicil.) The relationship arises either, on the one hand, from the propositus being, or having been, resident in such territory with the intention of making it his permanent home or, on the other, from there being, or having been, such a relationship on the part of some of other person on whom the propositus is for this purpose legally dependent. Thus, a wife is for this purpose legally dependent on her husband, and a legitimate child on his father. This type of domicil of the child and the wife is termed a domicil of dependence. The domicil that the child derives from the father is also known as his domicil of origin. Every person capable of acquiring an independent domicil will, on independence, retain his domicil of dependence, though it may be abandoned at any time thereafter.

Every individual is regarded as belonging, at every stage in his life, to some community consisting of all persons domiciled in a particular country. The principles of domicile are such that this legal idea may not correspond to social reality. Although a person may have no permanent home, the law requires him to have a domicile. He may have more than one home, but he can have only one domicile for any one purpose. He may have his home in one country, but be deemed to be domiciled in another.

Domicile has been criticised as a pre-condition to a claim under the I(PFD)A. The social changes, globalisation and freedom to move between countries, since the introduction of the I(PFD)A, serve to underline some of the criticisms. In ***Cyganik v Agulian and another [2006] EWCA Civ 129***, Longmore LJ held at para 58 that:

"*I find it rather surprising that the somewhat antiquated notion of domicile should govern the question whether the estate of a person, who was, on any view, habitually resident in England should make provision for his dependants. Now that many family matters are decided by reference to habitual residence, there may, perhaps, be something to be said for reconsidering the terms of s1 of the Inheritance (Provision for Family and Dependants) Act 1975. As Dr JHC Morris observed of the concept of domicile in the last (3rd) edition of his Conflict of Laws (1984), which he wrote before he died,*

> *"Originally it was a good idea; but the once simple concept has been so overloaded by a multitude of cases that it has been transmuted into something further and further removed from the practicalities of life."*

This observation has not been preserved by subsequent editors (6th edition (2005)) but it deserves to be."

Determining whether a person has acquired a domicile in a foreign county thus prohibiting an application under the I(PFD)A is determined in accordance with the law of England and Wales. No one factor is decisive - ***Cyganik v Agulian [2006] EWCA Civ 129; Morgan v Cilento [2004] EWHC 188 (Ch); Holliday v Musa [2010] EWCA Civ 335***.

There are three types of domicile – domicile of origin, domicile of dependency and domicile of choice.

Domicile of Origin

A domicile of origin is assigned to every person at his birth, which is that of his father, if he is legitimate and born in his father's lifetime (***Forbes v Fornes [1854] Kay 341***) and that of his or her mother if illegitimate (***Idny v Udny [1869] LR1*** and Dicey & Morris, The Conflict of Laws) or born after his father's death.

An adopted child will have the domicile of his or her adopted parents. That is because once the court makes an adoption order, the law regards the adopted child, as being born to the adopters. Section 67(1) Adoption and Children Act 2002 provides that "*An adopted person is to be treated in law as if born as the child of the adopters or adopte*r."

A domicile of origin is capable of persisting during the lifetime of a person or until he acquires a new domicile i.e. domicile of choice or a domicile of dependence. A child's domicile will change if his parents change their domicile.

A domicile of origin cannot be lost by abandonment (***Bell v Kennedy [1866-69] 1 Sc & Div 307)*** unlike a domicile of choice.

A person cannot have more than one domicile at the same time for the purposes of succession. The purpose of determining a person's domicile is to connect that person to the legal system of one particular country

In ***Barlow Clowes International Limited (In liquidation) v Hemwood [2008*]** **EWCA Civ 577** Arden LJ set out the general principles to determine domicile of origin at paragraph 8:

"(i) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it (Dicey, pages 122 to126).
(ii) No person can be without a domicile (Dicey, page 126).
(iii) No person can at the same time for the same purpose have more than one domicile (Dicey, pages 126 to128).
(iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired (Dicey, pages 128 to 129)."

Re Flynn, Flynn v Flynn [1968] 1 All ER 45 determined that the place where a child is born is immaterial.

Olafisoye v Olafisoye (Jurisdiction)[2011] 2 FLR 553 was a family case where the husband was not domiciled or habitually resident in England. The wife was born in Scotland to parents who had settled in England and acquired a domicile of choice. She acquired her father's domicile, but while she was still a minor her father returned to live in Nigeria, therefore reviving his domicile of origin. Therefore she acquired his Nigerian domicile and this continued into her adulthood without her acquiring a new domicile elsewhere.

In ***Cyganik v Agulian and another [2006] EWCA Civ 129,*** the deceased was born in Cyprus. The deceased, a Cypriot-born man who had lived in the UK for over 40 years from the age of 19 until his death age 63. The deceased retained close links with Cyprus where he owned property. The deceased returned to Cyprus with the intention of permanently living there in 1972. Upon Turkey occupying Northern Cyprus, the deceased returned to England in 1974, although his intention to return to Cyprus remained. The Court of Appeal determined that having considered all the deceased's life events, his attachment to the land of his birth and his identity, outweighed all others, thus a change of domicile had not been established. **Mummery LJ held at paragraph** 52 that "*I would allow the appeal and declare that, at the date of his death, Andreas was domiciled in Cyprus*."

In ***CC v DD (Parental Order: Domicile)[2014] EWHC 1307 (Fam),*** Theis J relied upon the principles enshrined within ***Barlow Clowes International Limited (In liquidation) v Hemwood.*** Theis J held that:

"24. It is very much a question of fact based on the circumstances of each case. The court needs to consider the broad canvas of evidence in order to establish the intention of the relevant person."

Domicile by Dependency

Whilst a child acquires his domicile of origin at birth, a child is only capable of acquiring an independent domicile of choice on attaining the age of 16 – Section 3(1) Domicile and Matrimonial proceedings Act 1973.

A child under 16, or a person who lacks mental capacity, has a domicile of dependency, which is that of his parents. The domicile is that of the father when the parents are married and living together. Consequently, if the father acquires a domicile in another country the child automatically acquires a domicile of dependency in that country.

When parents are separated, the child's domicile or the domicile of the person lacking capacity is that of the parent with whom he has his home to the exclusion of the other. When the child's father and mother are alive but living apart, then Section 4 of the Domicile and Matrimonial Proceedings Act 1973 applies, namely, if living with mother and no home with father, then the child takes the mother's domicile.

Once a child attains the age of 16 he is able to acquire a domicile of choice independently of his parents, but until then his domicile will remain that which he acquired from his parents – ***Sekhri v Ray [2013] EWHC 2290***. That is so whether the child had a domicile of origin or a domicile of dependency.

A person who lacks mental capacity, probably retains the domicile which he had when he became incompetent. The Mental Capacity Act 2005 empowers the Court of Protection to make decisions on behalf of a person lacking capacity concerning his property and affairs (Sections 14 and 16). A decision as to where the person is to live in the immediate future is within the scope of that power. It is uncertain whether a decision as to permanent residence is within that power.

Domicile of Choice

A person acquires a domicile of choice when he leaves his domicile of origin and moves to live in a country of his choice with the intention of residing there permanently or indefinitely living there. Two requisites must be satisfied before a person acquires a domicile of choice, namely:

i) residence actually in the country of choice; and
ii) an intention to live there permanently.

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

i) 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 [1953] 1 WLR 865***). The persons 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.

Where there is no direct evidence of intention, length of residence is relevant to establishing what the intention was (***Re Grove [1888] 40 Ch 216***). Length of residence is not a decisive factor.

There is no reason in principle why a person whose presence in England and Wales is unlawful cannot acquire a domicile of choice here: ***Mark v Mark [2005] UKHL 42***. Baroness Hale opined at paragraph 49 that:

> *"it seems to me that there is no reason in principle why a person whose presence here is unlawful cannot acquire a domicile of choice in this country. Although her presence here is a criminal offence, it is by no means clear that she will be required to leave if the position is discovered. Her position is in reality precarious in the same way that the aliens' presence was precarious in the Boldrini line of authority. In fact, it was always much less likely that this wife would ever be removed from this country than it was that the propositus in Cruh v Cruh [1945] 2 All ER 545 would be removed."*

ii) 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 [1885] 29 Ch D 976***).

Cyganik v Algulian [2006] EWCA Civ 129 summarised the correct approach. Mummery LJ held *at [46] that:*
"*the court must look back at the whole of the deceased's life, at what he had done with his life, at what life had done to him and at what were his inferred intentions in order to decide whether he had acquired a domicile of choice in England by the date of his death. Soren Kierkegaard's aphorism that "Life must be lived forwards, but can only be understood backwards" resonates in the biographical data of domicile disputes."*

In ***Morris v Davies [2011] EWHC 1773*** it was held that a British citizen living in Belgium and working in France had not lost his domicile of origin, but had remained domiciled in England throughout. His connection with France was one of convenience for work. Whilst he had a more substantial connection with Belgium, the evidence did not establish domicile of choice. Mr Hollander QC (sitting as a deputy judge) concluded at [73] that the deceased "*would have been horrified to learn that after his death it would be suggested in open court that he had acquired a domicile of choice of Belgium*."

The reasons behind why a person decided to leave his original domicile are immaterial. Instead the applicable test is whether the person intended to make his or her home in the new country until the end of his existence or until something happens causing them to change his or her mind - ***IRC v Bullock [1976] 1WLR 1178***.

In IRC v Bullock [1976] 1WLR 1178 the Court of Appeal held, that although the establishment of a matrimonial home in a new country was an important factor in deciding whether that new country became the permanent home, it was not conclusive.

The taxpayer had maintained a firm intention to return to Canada should he survive his wife, which was not merely a vague aspiration but amounted to a real determination, thus he could not have had the intention of establishing a permanent home in England and he had not acquired a domicile of choice in England.

In ***Barlow Clowes International Limited (In liquidation) v Hemwood [2008*]** **EWCA Civ 577,** Arden LJ also held at paragraph 8 that:

"(vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise (Dicey, pages 133 to138).

(vii) 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 (Dicey, pages 138 to143).

(viii) 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 (Dicey, pages 144 to151).

(ix) 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, and not otherwise (Dicey, pages 151 to153).

(x) 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 (Dicey, pages 151 to 153)."

If a person subsequently abandons his domicile and fails to acquire another domicile of choice, then he reverts to his domicile of origin. A person abandons his domicile of choice in a country if he i) ceases to reside there, and ii) no longer has the intention of permanent or indefinite residence there.

In **Re Flynn, Decd; Flynn v Flynn [1968] 1 WLR 103** Megarry J held at 115 that
"Acquisition and abandonment are correlatives; in Lord Westbury's words, "Domicile of choice, as it is gained animo et facto, so it may be put an end to in the same manner." When animus and factum are each no more, domicile perishes also; for there is nothing to sustain it. If a man has already departed from the country, his domicile of choice there will continue so long as he has the necessary animus.

When he no longer has this, in my judgment his domicile of choice is at an end, for it has been abandoned; and this is so even if his intention of returning has merely withered away and he has not formed any positive intention never to return to live in the country. In short, the death of the old intention suffices, without the birth of any new intention."

In **Qureshi v Qureshi [1972] Fam 173** Sir Jocelyn Simon P held at 191 that:
"a domicile of choice is less retentive, and therefore more easily abandoned, than a domicile of origin."
General

The relationship of domicile is between a person and a country, and never arises from membership of a group as distinguished from the country in which the group is domiciled. The municipal law of the country of domicile may itself distinguish between classes of those subject to it, and apply different rules according to the race, caste, creed or other characteristics of a particular person, so that even after the domicile has been ascertained it may also be necessary to inquire into the other characteristics of the individual before the particular rule applicable to his case can be known - ***Abd-ul-Messih v Farra (1888) 13 App Cas 431, PC; Maltass v Maltass (1844) 1 Rob Eccl 67; Casdagli v Casdagli [1919] AC 145 at 163, HL; Re Askew, Marjoribanks v Askew [1930] 2 Ch 259 at 270.***

Standard of Proof

The grant of representation to the deceased's estate may state that the Deceased died domiciled in England and Wales. However, such a statement is not conclusive.

It is for the claimant to establish that the deceased was domiciled in England and Wales to the civil standard of proof, namely, the balance of probabilities. The deceased's domicile, must be proved by the applicant - ***Mastaka v Midland Bank Executor and Trustee Co Ltd [1941] 1 All ER 236***.

Mastaka v Midland Bank Executor and Trustee Co Ltd concerned an application under the Inheritance (Family Provision) Act 1938, by Joan Patricia Mastaka, an infant, by her next friend, for reasonable provision for maintenance out of the estate of her mother, the testatrix, Elizabeth Isabel White. Farwell J held that:
"it is an essential ingredient of an application of this sort that the plaintiff should prove that the dead person was domiciled in England at the date of the death. That evidence is not forthcoming. No doubt there is no direct evidence to the contrary, but there is sufficient in this case to make proof of the domicil of the testatrix necessary before the court can give the assistance for which the applicant asks. The evidence leaves the matter completely at large."

In ***Re Flynn, Decd; Flynn v Flynn [1968] 1 WLR 1013***, Megarry J held at 115:
"The standard of proof is, I think, the civil standard of a balance of probabilities, subject to the overriding consideration … that so serious a matter as the acquisition of a domicile of choice (or for that matter, I think, the abandonment of a domicile) is "not to be lightly inferred from slight indications or casual words."

In Re B (Care Proceedings: Standard of Proof) [2008] UKHL 35, the House of Lords, dealing with a care case, determined that there was only one civil standard of proof, and that was proof that the fact in issue more probably occurred than not. There was no 'heightened civil standard' and no legal rule that 'the more serious the allegation, the more cogent the evidence needed to prove it'; common sense, not law, required that, in deciding whether it was more likely than not that something had taken place, regard should be had, to whatever extent was appropriate, to inherent probabilities (paras [12], [13], [15], [64], [68]–[70]).

In Re B (Care Proceedings: Standard of Proof) Baroness Hale opined at paragraph 72 that:
"As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable.

Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

In ***Henwood v Barlow Clowes International Ltd (in liquidation) and o*thers** (decided 3 weeks before ***Re B(Care Proceedings: Standard of Proof***)) *Arden LJ held that:*

"88. In essence there is no need for any higher standard of proof where more serious allegations are made in civil cases because the civil standard has the inbuilt flexibility to take the seriousness of an allegation into account. Accordingly the more serious an allegation the more substantial will need to be the evidence to prove it on a balance of probabilities."

Re B (Care Proceedings: Standard of Proof) has been taken to apply across the civil spectrum. By virtue of the seriousness of the allegation, clear and cogent evidence will be needed to show that the balance of probabilities has been tipped. This approach is likely to be applied whether the question is one of the acquisition or loss of a domicile.

Evidence

The evidence must be clear, cogent and convincing - ***Re Fulds Estate (No 3), Hartley v Fuld[1966] 3 All ER 776.*** Scarman J held at 726 that:
"Two things are clear — first, that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists: and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred from slight indications or casual words."

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. Declarations must be analysed by considering factors such as the person to whom they were made, the purposes for which they were made, the circumstances in which they were made, and should be fortified by conduct consistent with the declarations.

The 2 following decisions show the contrasting outcomes to declarations.

In ***Re Lloyd Evans, Decd. National Provincial Bank v Evans [1947] Ch 695*** the testator born in Wales in 1864, whose parents were British subjects, went to Java in 1880 and lived there until 1917. He married a Dutch woman in 1888, and had three children by her. In 1917 he and his family returned to England, but remained there only a short time. He settled in Brussels with his wife and his son and in 1922 purchased a house and later carried on business there. His wife died in 1939, after which he tried to sell his house, but could not do so. On 10th May 1940, the German army invaded Belgium and he was persuaded with reluctance to leave the country and went temporarily to the South of France, before escaping to England in June, 1940. While in France he wrote to his notary saying that he was a Belgian citizen, domiciled in Belgium for the last 19 years, and had intended to make a new will, but had no time to do so.

In London he occupied 3 furnished flats in succession, made a Will in July 1943, and died in July 1944. Wynn-Parry J held that he never intended to remain in England longer than he was obliged and had not abandoned his Belgian domicile of choice and took the document into account. The testator's act in leaving Belgium was dictated by force of circumstances, and was not the result of a free choice.

In ***Re Liddell-Grainger's Will Trusts, Dormer v Liddell-Grainger [1936] 3 All ER 173*** the testator's domicile of origin was England, where he was born, but in 1897 he moved with his parents to Scotland, to Ayton Castle, which he subsequently inherited, and where he resided for 38 years until his death in 1935. The testator, wrote in his Will that: "*I have not relinquished and do not intend to relinquish my English domicil*." He had a great love for his property in Scotland and was anxious that after his death it should remain in his family and not be sold. At his own request, the testator was buried in Scotland. The executors of the Will took out a summons to determine *inter alia* whether the testator was at the time of his death domiciled in England or in Scotland. It was contended that the declaration in the Will was ineffective, having been made to avoid Scottish law, which would have restricted the testator's power to dispose of personal property. Bennett J held that the testator had by various acts manifested an intention to live permanently in Scotland, and that his intention, together with his long residence in Scotland, was sufficient to discharge the burden of proof that he had acquired domicile of choice.

The courts have determined that if a person takes up residence in another county as a fugitive from justice (***Re Martin [1900] P 211***), a political refugee (***May v May [1943] 2 All ER 146***), or to avoid creditors (***Pitt v Pitt [1864] 12 WR 1089***), he does not acquire domicile in that country unless he forms the intention of residing there permanently or for an unlimited time. Likewise residence abroad to perform judiciary functions (***Attorney General v Rowe [1862] 1 H & C 31***), a member of the armed forces (***Re Macreight [1885] 30 Ch C 165***) or as a consul (***Sharpe v Chrispin [1869] 1 P & D 611***) have been held not to confer foreign domicile.

In ***Irvin v Irvin [2001] 1 FLR 178,*** the husband and wife argued over change of domicile in their divorce. The husband's links with friends in England, his British nationality and his limited assimilation into Dutch society provided the necessary convincing evidence to satisfy the court on the balance of probabilities that he did not abandon his domicile of choice in England and that his state of mind indicated a resolve to return to England to retire. Cazalet J concluded that the husband had not abandoned his domicile of choice either as an unequivocal act of abandonment or through an unequivocal intention to abandon.

When determining a change of domicile, the court will consider all the circumstances from which the deceased's intention to change his domicile can be ascertained. The relevant factors, relating to the deceased, that may be considered include, but are not limited to:

i) the time he or she has spent in a country;
ii) his or her citizenship or nationality;
iii) any change in citizenship or nationality;
iv) his or her age;
v) business interests or commitments;
vi) where he or she may own property;
vii) choice of language;
viii) religious beliefs;
ix) the form and content of any Will that he or she may have made;
x) the degree of assimilation in a new country;
xi) what he or she may have said or written during their lifetime.

In ***Bheekhun v Williams [1999] 2 FLR 229*** the husband was born in Mauritius (then a Crown Colony) in 1931 and moved to England in 1960, followed in 1961 by his wife. In 1968, when Mauritius became an independent state, the husband and wife chose to retain British nationality. Thereafter the husband held a British passport, although he maintained strong business links with Mauritius, visiting most years, sometimes for months at a time, and owning property there. The wife left the husband in 1975 and issued divorce proceedings in England in 1977. Decree nisi was not pronounced until 1990, but in 1993, before the decree absolute and resolution of the wife's financial provision claims, the husband died. The husband under his Will, left his entire estate, consisting of property in England and Mauritius, to a niece who had been living with him in the former matrimonial property. The wife applied for reasonable financial provision. The wife was awarded £70,000, which represented 44% of the total value of the estate, but which consumed all but £2,000 of the husband's English estate. Chadwick LJ dismissed the personal representatives appeal against the decision that the husband had been domiciled in England at his death, and his treatment of foreign immovable property in Mauritius as part of the estate.

In ***Morgan v Cilento and others [2004] EWHC 188 (Ch)*** the deceased died in 2001. D1 was the deceased's widow, D2 was his former wife and D3 and D4 were his daughters. D5 had had a relationship with the deceased during the last years of his life. It was common ground that the deceased's domicile of origin was in England and Wales. The issue was whether the deceased was domiciled in England and Wales or in Queensland, Australia at the date of his death. D1 to D4 contended that the deceased had died domiciled in Queensland. D5 contended that the deceased had never lost his domicile of origin and in the alternative, if the deceased had acquired a domicile of choice in Queensland, he had abandoned it before he died and his domicile of origin had revived. Lewison J held that on the evidence the deceased had died domiciled in Queensland.

The 2 components necessary to establish a domicile of choice were voluntary residence as an inhabitant rather than as a casual visitor and an intention to remain indefinitely. A domicile of choice might be lost in circumstances where a propositus had ceased to reside in the territory in which he had a domicile of choice and the propositus had no intention to return to reside there (as opposed to an intention not to return). The absence of intention had to be unequivocal, so that a person who was in two minds did not have the necessary absence of intention. In addition the abandonment of a domicile of choice was not to be lightly inferred.
In ***Kearly v Kearly [2010] 1 FLR 619*** dispute arose over the court's jurisdiction to hear the divorce petition. The wife was an Australian, currently living in Australia; the husband was English, currently based in France, where he worked. Ryder J held that:
"[39] The hurdle is relatively high. Domicile of choice has to be established on clear, cogent evidence. A mere assertion as to being Australian is hardly sufficient. The husband lives in Paris, and has previously and recently lived elsewhere than Australia for significant periods. He seeks to liquidate his Australian assets and not preserve them. He declares his address for tax purposes in 2007 as being his parents' home in England. He did not declare himself to be domiciled in Australia on his Australian family application forms. Instead, he said he was ordinarily resident there. His best evidence is that he wants to be an Australian citizen, but has on two occasions given up the attempt. This is not clear and cogent evidence."

In ***Divall v Divall [2014] 2 FLR 1104*** the husband was born in England, the wife in China. They married in England, during a visit by the wife to the UK on a tourist visa. The wife returned to China when the visa ran out but she subsequently obtained UK residency, became a British citizen and obtained a British passport. She relinquished her Chinese nationality, and thereafter had to obtain a visa, using her British passport, when travelling to China. In 2008 they emigrated to the Netherlands, eventually purchasing a house there. Shortly afterwards the wife began a relationship with a Dutchman and the parties separated. The husband issued an English divorce petition. The wife responded that she was not domiciled in England. The key issue for the court was the domicile of the wife.

Moor J held that if the wife had acquired a domicile of choice in England and Wales, she had not retained it at the date of the husband's divorce petition, applying the principle that domicile of choice was much less adhesive than domicile of origin. A person abandoned a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently or indefinitely. Applying *Qureshi v Qureshi [1971] 1 All ER 325*, it was not necessary to prove a positive intention not to return: it was sufficient to prove merely the absence of an intention to continue to reside. The wife had left England for the Netherlands with the rest of the family on what had been intended to be a permanent basis. By the time the marriage broke down, the wife had no intention of ever returning to England. The wife's definite intention was to spend the rest of her life in the Netherlands, and to acquire Dutch nationality. These facts were fatal to the husband's claim that she was domiciled in England and Wales on that date.

In ***Kebbeh v Farmer*** **[2015] EWHC 3927 (Ch)** the defendants contended that the deceased, who had an English domicile of origin, had died domiciled in Gambia. If that was correct, it was common ground that the claimant had no claim under the Act. Judge Purle QC concluded that there was overwhelming evidence that the conduct of the deceased was consistent with a settled intention to remain and live indefinitely in Gambia.

In ***U v J [2017] EWHC 449 (Fam)*** the court had to consider domicile in the context of divorce proceedings. J was born in India but moved to London in about 1957. In 1960, J's father became a naturalised British citizen. J completed his education, including university, in England. In 1972, J joined the civil service, where he worked for 23 years. In 1978, J purchased a house in Fulham. In 1995, J worked in Luxembourg. In 1997, J secured a job in Brussels, where he met his wife, U. In 2002, J was assigned to work in London and moved back there with U.
Between 2003 and 2005, J spent extended periods with U in Albania, where she worked. U was a British and Irish dual national, having been born in England. In 1995, U applied for, and obtained, a British passport. After completing her education, U worked in Brussels until 2001. Thereafter, U moved with J to London where they lived in the Fulham property. In 2005, U was granted diplomatic status. U's permanent address was recorded as London, and her address was that of the Fulham property. In August, U and J married in Italy. They entered into a pre-nuptial agreement in which it stated, amongst other things, that J and U were habitually resident in Italy. In 2006, J moved to live in Sarajevo, Bosnia having taken up a job there. In 2015, the marriage broke down and U issued her petition for divorce in London. U sought dissolution of her marriage from J and contended U was domiciled in England.

Cobb J held that:

i) Since 2000, at the latest, U had acquired a domicile of choice in England and Wales, which had not been lost notwithstanding her previous postings abroad (paras [61], [63], [64]); and

ii) At one time, as a man in early adulthood through to his early 50s, J probably had acquired a domicile of choice in England. His connections with England had been, at one time, strong. Since 1995, and more particularly in the last ten years, his connections had withered. Accordingly, at some point in the last ten years, J's domicile of choice in England had been lost or abandoned and his domicile of origin in India had revived (paras [65], [67], [68]).

Overview

The authorities demonstrate the fact specific nature of each case and the need to carefully consider the details.

The presumption is that the domicile of origin will prevail, unless the evidence is strong enough to show that a domicile of choice has been acquired and retained by the deceased until his or her death.

A lengthy period of residence, without evidence of the deceased's intention to abandon domicile of origin and remain in his or her 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 and Wales. The circumstances up until death ought to disclose no indecision on his or her part or that he or she had not made up their mind.

Other parts of the United Kingdom

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

By virtue of Section 27(2) I(PFD)A does not extend to Scotland or Northern Ireland.

In Northern Ireland the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979, SI 1979/924, applies to deaths of individuals domiciled in Northern Ireland on or after 1 September 1979 and is in large part identical to the I(PFD)A.

Courts that can determine applications

Section 25(1) I(PFD)A defines "the Court", as "*unless the context otherwise requires, means the High Court or where the County Court has jurisdiction by virtue of Section 25 the County Courts Act 1984, the county court".*

The County Court now has jurisdiction to hear and determine any application for an order under Section 2 of the IPFD)A (including any application for permission to apply for such an order and any application made, in the proceedings on an application for such an order, for an order under any other provision of that Act).

Julian Reed
Pump Court Chambers
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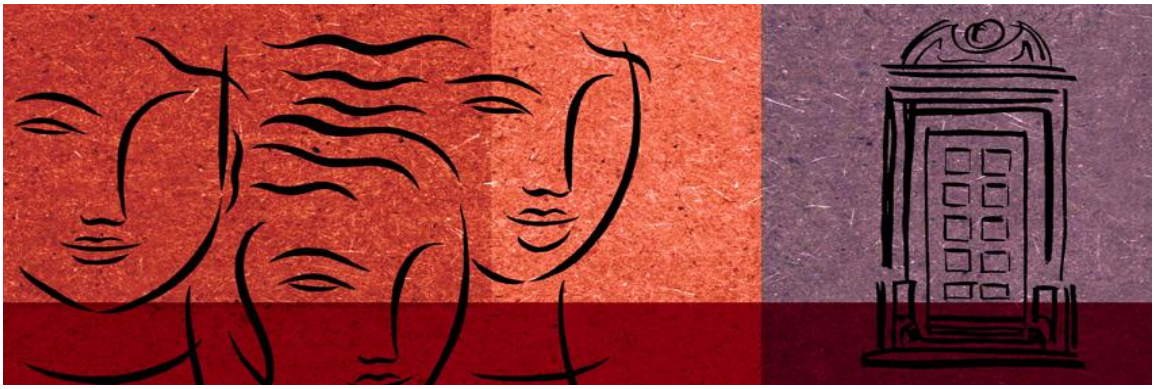

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Pump Court Chambers

The LEGAL 500
UNITED KINGDOM
LEADING SET
2019

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