



# PUMP COURT

## CHAMBERS

**Hasan v Ul-Hasan [2021] EWHC 1791 (Fam):  
The Implications of Death on Divorce and Financial Remedies**  
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September 2022



## Impact of Death on Divorce and Financial Orders

- Spouses remain married until Decree Absolute. If one party dies at any time until the pronouncement, parties remain spouses at date of death
- For inheritance purposes the marriage still exists, and no further step in the divorce proceedings can be taken (***Purse v Purse [1981] Fam. 143***).
- If either party dies before an *application* for financial provision or property adjustment is *made* under Matrimonial Causes Act 1973 or the Civil Partnership Act 2004, then the Court will no longer have jurisdiction under those Acts.
- See ***McMinn v McMinn (Ancillary Relief: Death of Party to Proceedings) [2002] EWHC 1194 (Fam)***.

## Impact of Death on Divorce and Financial Orders

- If an application has been made but the proceedings are yet to be determined, the application will abate. The surviving spouse would need to consider an application against the estate under the Inheritance (Provision for Family and Dependents) Act 1975.
- What happens if a spouse dies after the order has been made?
- The effect depends on *which spouse dies* and *what sort of order* has been made.
- Orders for financial provision, property adjustment or pension sharing is not effective and not capable of being enforced if the decree absolute has not been granted: ss. [23\(5\)](#), [24\(3\)](#) and [24B\(2\)](#), MCA 1973, and confirmed in ***McMinn v McMinn [2002] EWHC 1194 (Fam)***.

## Impact of Death on Divorce and Financial Orders

- What about periodical payments?
- Both secured and unsecured periodical payments will cease on the death of the receiving party. However, secured periodical payments will not be affected by the death of the paying party, but unsecured periodical payments would cease.
- Note: Any arrears of unsecured periodical payments can still be enforced against an estate if the paying party dies.
- ***Sugden v Sugden [1957] P 120***: arrears of maintenance could be recovered on death but not future payments, and in which Denning LJ confirmed that claims for ancillary relief were not ‘causes of action’.

## Impact of Death on Divorce and Financial Orders

- What about lump sum orders and property adjustment orders?
- Provided the decree has been made absolute, lump sum and property adjustment orders survive the death of either party.
- If the death occurs before implementation of the order, the surviving party may be apply to apply to set aside the order if the death amounts to a *Barder* event (more on this later...)

## Impact of Death on Divorce and Financial Orders

- What about pension sharing orders?
- If the person sharing their pension dies before the sharing order has taken effect, the pension share will fail and be unenforceable against the pension scheme.
- Tricky issues to note. E.g. if decree absolute is obtained and the transferor dies before the order has taken effect, there will be no surviving spouse benefits, and no pension sharing order.
- However, if the person sharing their pension dies after a pension sharing order has taken effect but before implementation is complete, then the pension share is still effective and the receiver has acquired the right to the pension share.

## Impact of Death on Divorce and Financial Orders

- It is possible to provide that implementation of the pension sharing order is conditional upon the non-member spouse being alive at the time of implementation – include provision that the recipient's personal representatives will consent to a *Barder* appeal if this occurs (see the wording in the standard orders).
- What about pension attachment orders (formerly earmarking)? In contrast to pension sharing orders, pension attachment orders are treated the same way as unsecured periodical payments (pension income will terminate on the death of either spouse) and lump sums on death.

## Hasan v Ul-Hasan (deceased) & Anor.

- Time for change?
- **Hasan v Ul-Hasan:** core question before the Court was whether the un-adjudicated claim by the wife under Part III survived the death of the husband and could be continued against his estate.
- **Facts:** Couple had married in 1981 and separated in 2006. H had obtained a divorce in Pakistan in 2012. Extensive property portfolio and other assets. In August 2017, W given leave to bring Part III proceedings.



## **Hasan v Ul-Hasan (deceased) & Anor.**

- Several interlocutory hearings took place mainly to deal with H's non-disclosure.
- However, in January 2021, just before the W's substantive application could be dealt with, the H died at age 81. The W was 74.
- W argued that the authorities under Part II MCA 1973 and under the I(PFD)A 1975 – which state that financial claims expires with the death of the respondent – did not bind the court because they did not relate to Part III claims.
- In other words, W argued that the question had never before been considered under Part III; it was, she argued, a “blank canvas”.

## Hasan v Ul-Hasan (deceased) & Anor.

- **Decision (Mostyn J):** Held that the wife's claim under Part III of the MCA 1973 did not survive the death of her husband and that the court was bound by ***Sugden v Sugden [1957]***.

*“That jurisprudence unambiguously states that a financial claim made during marriage or following divorce expires with the death of the respondent. In my judgment, this principle applies equally whether the claim proceeds under Part II following a domestic divorce or under Part III following an overseas divorce.*

## Hasan v Ul-Hasan (deceased) & Anor.

- However, Mostyn J fundamentally disagreed with *Sugden*, and took the view that a financial remedy claim is a “cause of action” which would survive death.
- s1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 continues a deceased party’s “causes of action” existing at the time of death for the benefit of their estate, as well as causes of action against them.
- In *Sugden*, Denning LJ had held that claims for ancillary relief were not ‘causes of action’ that could subsist post-death, unless an effective order had already been made. This had been followed in subsequent authorities.

## Hasan v Ul-Hasan (deceased) & Anor.

- Mostyn J disagreed, and having analysed s.1 of the LR (MP) Act 1934, said:

*“It is therefore clear to me that Parliament must have regarded a claim for post-divorce ancillary relief as a cause of action for the purposes of s.1 of the 1934 Act. Once that has been accepted it can be seen that Parliament specifically decided not to include a claim for post-divorce relief in the list of excluded causes of action.” (para. 40)*

- S.1 of the 1934 Act does not define "cause of action", but the Court observed that it includes processes which are speculative, personal and discretionary.

## Hasan v Ul-Hasan (deceased) & Anor.

- In short, if there is a right which gives rise to a remedy from the court, then there is a cause of action: *Letang v Cooper* [1965] 1QB 232; *Mercedes-Benz AG v Leiduck* [1996] AC 284.

- Mostyn J stated:

*“On this analysis it is very difficult to see why a claim for post-divorce relief is not a "cause of action". It is a right, at the very minimum, to apply to the court, which will award a remedy if the necessary facts are proved....I struggle to understand why a claim for damages following personal injury or a claim for an injunction are causes of action when a sharing claim earned over many years and which might be quantified in tens of millions of pounds is not” (paras. 45, 48)*

## Hasan v Ul-Hasan (deceased) & Anor.

- The Judgment also highlights the contrasting approaches to cases where death occurred shortly before trial and those cases where death occurred shortly after trial (for example, in *Barder*).
- On the one hand, there are cases holding that applications under the MCA can only be made and pursued during the joint lives of the parties: *D'Este v D'Este* [1973] Fam 55; *Harb v King Fahd Bin Abdul Aziz* [2005] EWCA Civ 1324
- On the other, there are cases where judges may not only set aside a disposition made by an order, but varies the order, exercising their own discretion after a party has died: *Barder v Barder*, per Lord Brandon.

## Hasan v Ul-Hasan (deceased) & Anor.

- What power is the appeal court applying when it makes by way of variation an alternative disposition? When the appeal court exercises its discretion in place of that previously exercised, what discretionary power is it wielding?

*“...There can only really be one answer to these questions. If the appeal court does more than merely set aside the disposition of the trial judge and makes an alternative disposition, then it must be applying the powers in ss.23 and 24 of the Matrimonial Causes Act 1973, those being the powers of the lower court. When exercising its discretion as to how those powers should be applied in place of the trial judge it can only be doing so under s.25 of the Matrimonial Causes Act 1973.” (para. 58)*

## Hasan v Ul-Hasan (deceased) & Anor.

- Where next?
- *Sugden [1957]* (now over 60 years old) remains binding authority.
- Mostyn J has granted a certificate permitting a leapfrog appeal to the Supreme Court as the decision raised a point of law of general public importance.
- NEWS: W has applied for leapfrog appeal – hearing in the Supreme Court in October 2022.



## Death as a Barder event

- ***Barder v Barder (Calouri intervening)* [1988] AC 20.** Consent order made whereby the husband was to transfer to the wife his interest in the FMH. The following month, the wife killed herself and the children.
- The court granted the husband leave to appeal out of time, allowed the appeal and set aside the consent order. Settlement had been based on fundamental assumption that wife/children required house to live in. Husband's half share in home restored to him; the wife's half share devolved to her estate.
- Remedy applies as much to consent orders as it does to orders made after a contested hearing. Treated as an appeal, but following amendments to FPR 2010, PD9A, para. 13, such applications should now be made to the first instance judge.

## Death as a Barder event

The following conditions must be met for a *Barder* appeal to succeed:

- (a) New events, which were both unforeseen and unforeseeable, have occurred since the making of the order which invalidates the basis, or a fundamental assumption, on which the order was made;
- (b) The new event has occurred within a relatively short time after the order – unlikely to be as long as a year, usually no more than a few months.
- (c) The application should be made reasonably promptly; and
- (d) The application should not prejudice third parties who have, in good faith and valuable consideration, acquired property that is the subject matter of the order.

## Death as a Barder event

- Courts generally not enthusiastic about use of *Barder* applications, save in very dramatic circumstances.
- Unexpected death of one party *may* provide an adequate basis: ***Barder***; and ***Smith v Smith [1991] 2 FLR 432***. In the latter, final order varied where W committed suicide six months later, lump sum varied so that W/ her estate received a lesser sum.
- ***Reid v Reid [2004] 1 FLR 736***. W died 2 months later, lump sum to H to provide him with greater capital.
- ***WA v Executors of the estate of HA & Ors. [2015] EWHC 2233 (Fam)***. Consent order reconsidered following H's suicide 22 days later, £17.34m due to H reduced to £5M.

# Incapacity

- Court of Protection has the power to make decisions on behalf of people who lack the capacity to make those decisions themselves under the Mental Capacity Act 2005.
- Under s.27 of the MCA 2005, however, the COP is not able to make certain decisions on certain family matters on behalf of an incapacitous person, for example, to:
  - Consent to marriage or CP;
  - Consent to sexual relations;
  - Consent to a divorce/dissolution on the basis of two years' separation (pre divorce law changes April 22).

## Capacity to Litigate

- If client/ P has no capacity to conduct litigation, they are considered a “protected party” and a litigation friend **must** be appointed to conduct the proceedings on their behalf: FPR r.15.2 and PD15A, para. 1.1
- A “protected party” is defined as a party or an intended party who lacks capacity within the meaning of MCA 2005 to conduct proceedings: FPR r. 2.3(1).
- A person may not without the court’s permission take any step in proceedings except (a) filing an application form; or (b) applying for the appointment of an LF until the protected party has a litigation friend: FPR r.15.3.
- **Any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise: FPR r.15.3(3).**

## Capacity to Litigate

- If there are any doubts about a party's capacity, the Court is required to investigate the issue as soon as possible: PD 15B, para 1.1
- Solicitors also have an important part to play. See PD15B, para. 1.3:

*"If at any time during the proceedings there is reason to believe that a party may lack capacity to conduct the proceedings, then the court must be notified and directions sought to ensure that this issue is investigated without delay....Where a party has a solicitor, the starting point is whether that solicitor has concerns about the party's capacity to litigate.*

- ***P v Nottingham City Council & the Official Solicitor [2008] EWCA Civ 462, para 99).***
- Procedure for appointing a litigation friend: FPR r.15.5 and 15.6 – either by court order or by filing a certificate of suitability.

## Capacity to Litigate

- ***Richardson-Ruhan v Ruhan & Ors* [2021] EWFC 6, Mostyn J.** Issue was whether wife (by now a litigant in person) had capacity to litigate.

*“The capacity to conduct proceedings cannot depend on whether the party receives no legal advice, good legal advice or bad legal advice. If the party would be capable of making the necessary decisions with the benefit of advice, then she has capacity whether or not she actually has the benefit of that advice....”*

*This interpretation is also consistent with section 3(2) of the Act, which provides that: “A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).”*

## Tips/ guidance

- Do any joint tenancies need severing?
- Do any changes need to be made to your client's Will?
- Do you want to delay decree absolute (to ensure receive Widow's pension) or expedite it (to avoid McMinn situation)?
- Do you need to secure your client's periodical payments or have insurance in place?



## Tips/ guidance

- Familiarise yourselves with the Mental Capacity Act 2005. Remember the presumption that a person has capacity unless proven otherwise.
- Be on the lookout for capacity issues – time and decision specific, and different thresholds. Capacity can also fluctuate.
- Seek medical evidence as to capacity if in doubt.
- Is your client a “protected party”, e.g. lacking capacity to litigate, and requires the appointment of a Litigation Friend?
- Remember the requirements of the FPR Part 15 and the consequences of non-compliance (unless leave given, steps taken in proceedings prior to appointment of LF of no effect).

## Tips/ guidance

- Notes/ commentary in the Red Book to FPR Part 15 very helpful.
- FJC's Guidance on "Capacity to litigate in proceedings involving children" (April 2018):  
<https://www.judiciary.uk/wp-content/uploads/2018/04/capacity-to-litigate-in-proceedings-involving-children-april-2018.pdf>
- Law Society Guidance (May 2022): "Working with clients who may lack mental capacity":  
<https://www.lawsociety.org.uk/topics/client-care/working-with-clients-who-may-lack-mental-capacity>
- **Watch out for Supreme Court decision in Hasan v Ul-Hasan (UKSC 2021/0159).**



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*"An absolute class act. She can grapple with complex matrimonial finance work in a heartbeat. She is a confident and calm practitioner with gravitas, technical ability and professionalism far beyond her year of call"*

**-Legal 500 (2022)(Tier 1)**

*"Jennifer is everything you would want in counsel. She has exceptional attention to detail coupled with a firm but fair approach to the opposition."*

**-Chambers & Partners (2022)**

Jennifer Lee is a specialist family law practitioner. She is regularly instructed in financial remedy cases involving family businesses, inherited wealth, nuptial agreements, and trusts. Many of her cases also involve foreign assets, tax complications and cross-jurisdictional issues. She has appeared in high-profile reported cases, most notably *in Velupillai [2015] EWHC 3095 (Fam) (High Court); LFL v LSL (McKenzie Friends & Breach of Court Orders) [2017] EWFC B62*; and in *N v N (Afghanistan: Validity of an overseas marriage)[2020] EWFC B55*.

Jennifer has a niche practice in modern families, including surrogacy. She also leads the Court of Protection Team in Chambers and has a keen interest in capacity matters, particularly where they overlap with divorce/financial remedy claims. She acted for the successful applicant in *DB v DW [2015] EWCOP 16*, which involved competing P&A deputyship applications.

Jennifer sits as a [Fee-Paid Judge of the First-tier Tribunal \(Tax Chamber\)](#). She is ranked as a ["Leading Junior \(Tier 1\)- Family and Children Law" in The Legal 500](#), and as a [specialist in "family/matrimonial law" in Chambers & Partners \(UK Bar\)](#). She appears in family arbitrations, and undertakes private FDRs/ early neutral evaluations as counsel and judge.

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