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Inheritance Act 1975: Claims by spouses: Problems with the Divorce-Cross Check

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History Lesson

- Pre 1975 all claims for reasonable financial provision (including those of surviving spouses) were limited to maintenance
- In early 1970s Matrimonial Causes Act 1973 introduced capital and property provision for divorcing spouses
- The Law Com Report (No 61) *Family Provision on Death* concluded that
- [26] matrimonial law reform *"in a normal (matrimonial) case ... entitled to a share in the capital assets of the family"*.
- Impact upon enhanced level of provision for surviving spouses.

History continued

- [27] *“As a general principle, the surviving spouse should have a claim upon the family assets at least equivalent to that of a divorced spouse”.*
- Similar considerations: s.3(2) 1975 Act (a) age & duration of the marriage
(b) contribution made to the welfare of the family
- **Divorce-cross check or divorce fiction**; provision which the spouse may have received if marriage had been terminated by a divorce instead of death BUT not required to treat that level of provision as:
 - *“setting an upper or lower limit on the provision which may be made”*
- Only 1 of the s.3 considerations (not the pre-eminent consideration)

Lord Hughes in *Ilott*

- *Ilott v Mitson* [2018] Lord Hughes at [13] gave a succinct history lesson and concluded: *“the mischief to which the change (re increased standard of provision) was directed was the risk of a surviving spouse finding herself in a worse position than if the marriage had been ended by divorce rather than death”*.
- **Floor/ceiling problem** Law Com Report (No331) Intestacy and Family Provision on Death. Chancery Masters' concern that in small estates divorce cross check was proving to be too low a ceiling to accommodate the survivor's needs. Led to 2014 amend as to neither a floor or a ceiling!.
- But judicial observations e.g. *P v G* [2006] 1 FLR 476 para [242] the fact of 1 survivor: *“It seems to me probable that this difference will not infrequently be reflected in greater provision being made under the 1975 Act”*, than under MCA 1973.

Disconnect between life and death

- Examined below are 3 areas that commonly present difficulties in applying the divorce fiction to C's under s.1(1)(a) 1975 Act:
- (i) How to deal with pensions or assets released on death in applying the fiction
- (ii) The needs of the survivor
- (iii) Duration of the support for maintenance

These are just some of the mental gymnastics involved.

Basic matrimonial principles

- *Miller v Miller* [2006] 2 AC 618 para [9-17] Lord Nicholls 3 principles under MCA 1973
- **Needs** (alpha & omega in most cases w 2 live parties)
- Compensation (rarely relevant, as absorbed by needs)
- **Sharing** – “*When their partnership ends each is entitled to an equal share of the assets of the partnership*”
- But in *White & Carter* identified matrimonial property as “*property acquired during the marriage otherwise than by inheritance or gift*”.

Pension benefits in the divorce cross-check

- To carry out the divorce cross-check the capital assets of the surviving spouse to be added to the estate assets as defined by s.25 1975 Act (will exclude most pensions)
- Value taken as date of the hearing s.3(5)
- Death may led to additional assets e.g. pensions providing an income or lump sums
- Under s.24B-E MCA 1973 the matrimonial court can now make an order on divorce directly imposing a pension share upon a spouse's pension, so as create a separate fund upon divorce. See e.g. *W v H* [2020] EWFC B10 in contrast to 1975 Act
- <https://www.nuffieldfoundation.org/news/new-good-practice-guide-addresses-shortfall-understanding-how-treat-pensions-divorce>.
- ~~Wide powers to re-allocate pensions when applying MCA 1973.~~

Complexity of pension & death benefits

- 1975 Act cannot re-allocate most pension benefits. S.25 confined to assets T had power to dispose of. Most pensions held on trust by pension trustees.
- Under s.2(1)(f) 1975 is a very limited jurisdiction only if a SIPP pension scheme amounts to a nuptial settlement as found in *P v G* (SIPP pension) not occupational pension schemes
- Can be important in applying the cross-check to have regard to loss of pension sharing order under MCA 1973. In *Miles v Miles* [2018] WTLR 1347, the s.25 estate was £381,000 only but from pension and death benefits £368,000 passed to new cohabitee & children.
- On appeal the judge partially ignored that the deceased formerly had a pension valued at £300k, when calculating the potential MCA 1973 award. If the divorce had proceeded before death wife would have secured a pension sharing order for 50%. Argument for “offsetting” lump sum figure from the estate.

Duration of maintenance provision

- Under the MCA 1973 court look at the concept of a “*gentle transition to independence*”. S.25A(1)-(3) court to consider order for sufficient term to allow adjustment without undue hardship
- No such direction under 1975 Act. Though s.3(6) requires regard to be had to earning capacity
- Demographics of older claimants no earning capacity in most 1975 Act cases
- Younger spouses left as single parents whose earning capacity compromised by 100% responsibility for children.
- A fundamental difference in principle separation by death versus decision to end a marriage?. See *Cunliffe v Fielden* [2005] Civ 1508.

The survivor's needs in 1975 Act

- When considering needs under MCA 1973 – if amount produced by sharing principle does not satisfy needs then needs calculation trumps the results of the sharing principle but 2 people's needs considered
- 1 surviving spouse only does this mean all needs of the survivor satisfied?
- Lord Hughes *lott* at para [13] not carte blanche to re-write the will without regard to testator's wishes. So divorce-cross check then relevant as a limiting factor
- In *Miles* in the throes of divorce (died post decree nisi) C's adult sons retained £100k from their father's estate despite C'S apparent needs for all the estate.

Generous provision for health needs

- See the 1975 case of *Re Clarke* [2019] EWHC 1193 Deputy Master Linwood for generous provision for elderly disabled widow. 2nd marriage (13 plus years) came to live at pre-acquired family home (Value £1.380m) to the chagrin of 2 sisters of 1st marriage. Who were found to have manipulated their father and 1 sister took funds from him
- Widow required nursing home care in outer London at over £70,000 pa. Award £731,000. Plus share of residue.
- 2 particular feature valuable former matrimonial home accorded special place in a relationship. Plus unattractive conduct (s.3(1)(g)) of adult children made for sympathetic court!. Very generous award far greater than on divorce.

Matrimonial homes in MCA 1973 cases

- What is the status of the matrimonial home “fmh”. In later marriages often a feature the home is pre-acquired asset of one party
- *Miller* para [22] Lord Nicholls “a central place in any marriage. So it should normally be treated as matrimonial property”
- Use as the family home is an e.g. of the contributor accepting that the otherwise non-matrimonial property can be treated as matrimonial. See the MCA 1973 case of *WX v HX* [2021] EWHC 241 (Fam) Roberts J for analysis of the mingling or alchemy to convert property to matrimonial property.

Homes in 1975 Act cases

- In small estates the 1975 Act court may be prepared to award a surviving spouse the vast majority of the estate to secure housing
- See the recent case of *Beg v Beg* [2021] EWHC 2598 (Ch), where the fmh home was found to have passed by survivorship to widow's brother-in-law.
- HHJ Cooke made an order under s.9 1975 treating £80k of the value of the fmh as part of the net estate of the deceased.
- This allowed widow to redeem mortgage of £78k against a buy to let property that was the main other asset of the estate so that the widow & child were securely housed.

Non-matrimonial property under MCA 1973

- Why it matters – the application of the equal sharing principle impacts on the division of matrimonial property only *Scatliffe v Scatliffe* [2017] AC 93
- But a finding as to non-matrimonial status does not mean ring fenced as needs may require the transfer of non-matrimonial property to the other party
- A proportionate enquiry only!
- “*Big Money*” - Problems of forensic accountancy valuations of private companies at point of entry to marriage and exit.

Identification of non-matrimonial property

- *Jones v Jones* [2012] Fam 1 Wilson LJ (as he then was) apparent precision by reference to forensic valuations at entry to marriage and at separation (but with judicial adding of spring board potential) to the initial valuation
- Plus query an allowance for the increase in value per se " *Passive growth is to be contrasted with growth as a result of contributions of one sort or another made during the marriage, ie of activity*". May need to reference FTSE 100
- OR as in *XW v XH* [2019] EWCA Civ 2262 Moylan LJ purpose of the exercise is to "give fair overall allowance" for the existence of non-matrimonial property. In seeking to carve out the 2 types of asset it may not be possible to arrive at a reliable mathematically precise computation. At the discretionary stage of award what adjustment to 50% gives this fair allowance.

Valuations in 1975 Act claims

- In *Lilleyman v Lilleyman* [2013] Ch 375 Judge able to identify bright line in respect of pre-existing family company as non-matrimonial property. From estate of £6m, £5m+ represented by company developed by deceased before short 2nd marriage. Allowed for £250k only uplift to represent increase in growth attributable to activity during the marriage
- Private company valuations fraught with difficulty, see 1975 Act *B v C* [2021] WTLR 1. Discounts for % shareholding or quasi partnership with surviving family co-operation on sale. Loss of key man but potential for sale?

Nuptial Agreements

- Formal Nuptial Agreements "NA"s. Marriage Foundation research since 2000, 1 in 5 marriages some form of pre-nuptial agreement
- Spouses cannot agree to oust the jurisdiction of the court and promise not to bring a claim under MCA 1973 *Radmacher v Granatino* [2011] 1 AC 534.
- [2] *"A court when considering the grant of ancillary relief is not obliged to give effect to nuptial agreements .. the parties cannot, by agreement, oust the jurisdiction of the court. The court must however give appropriate weight to such an agreement"*.
- Nor can a spouse do so in respect of the right to apply under the 1975 Act, see *Hyman v Hyman* [1929] AC 601. The same policy reason applies in 1975 Act claims as to abrogating responsibility for a spouse.

Relevance of the NA

- The terms of the NA form part of the application of the divorce cross-check s3(2) 1975 Act
- Further as a piece of conduct relevant under s3(1)(g)
- As to impact on provision under MCA 1973 on divorce *Radmacher* “*the court should give effect to a nuptial agreement that is freely entered into with a full appreciation of its implications, unless in the circumstances prevailing it would not be fair to hold the parties to their agreement*”. Legal advice & disclosure.
- Unfair if it left one partner in “*a predicament of real need*”
- Plethora of MCA 1973 case law, see *Brack v Brack* [2018] EWCA Civ 2862 for review - normal impact of NA displace sharing principle and limit to a party's needs.

Hendry v Hendry

- The NA precedents often do include an agreement (albeit a void one) not to apply for an order under s.2 1975 Act death, provided a will has been made in terms “*as generous*” as the life time NA.
- No reported case of substantive spousal 1975 Act claim where NA restricting application has been dealt.
- Only referenced in a procedural case; *Hendry v Hendry* [2019] EWHC 1976 (Ch). Application for extension of time under s.4. Master gave considerable weight to an NA when reviewing substantive merits for s.4.

Consideration of NA in 1975 Act

- Where a late 2nd marriage protecting inheritance by adult children of previous marriage may be the main driver
- The disclosure for an NA & schedule of assets provide useful evidence of pre-acquired assets
- Problems when making a pre-nup difficult to predict impact of death e.g.
- Elderly survivor in need of expensive care
- Young widow w 100% responsibility for minor children
- Careful consideration of pension provision and life insurance to provide for needs based assessment
- More tailor made than simple repetition of provision as generous as MCA 1973 element of an NA.

Life interests in 1975 Act claims

- Where sharing principle bites on matrimonial property *White* onwards suggest need for outright provision, in 1975 cases.
- See *Berger v Berger* [2013] EWCA Civ 1305 obiter observations in a s.4 application. Widow of a 36 year marriage left a life interest in £6 m estate. Black LJ MCA 1973 would not have limited to her needs and arguable a 50/50 division of their assets.
- BUT where the needs principle only is engaged life interest may provide a valid method of provision, with caveat some part ownership of fmh.
- **First Question** what provision has been made – *Cowan v Foreman* [2019] EWCA Civ 1336. Application to extend time under s4. Provision made: (i) beneficiary of a discretionary trust (ii) revocable life interest in residue of estate (inc fmh). Letter of Wishes principal beneficiary.

Cowan v Foreman

- Family Judge Mostyn J failed to understand LOW was just that & a departure of the same was not of itself an actionable breach of trust
- Fixated that a needs only case in a 2nd marriage with pre-acquired assets
- LJ Asplin identified that effect of provision was that widow, no autonomy or security and no direct interest in their home of 20 years, so her claim had substantive merits for test applied in giving permission to proceed out of time
- Acute problem that life interest could be revoked spouse clearly vulnerable

Legal Principles versus Experience

- MA view if proper non-revocable life interest created then where all pre-acquired assets arguable that life interest in estate could amount to reasonable financial provision for needs based claim.
- But in medium sized estates neither C or D ever want life interest!.
- See *Lilleyman* para [81] re life interest in 50% share of fmh – would impose a fetter on securing equity release or move to residential home. Plus there life expectancy of widow 20 years reducing the net present value if life interest. Ordered as part of award outright estate's 50% share.

Needs and capitalisation of maintenance

- Schedule of needs - Family Department precedents
- Looking at reasonable provision for foreseeable future (beware inflated budget in *Wooldridge*) more than lifetime income stream
- May need discovery where deceased ran family finances
- Capitalisation issues – MCA 1973 Duxbury Tables 10 At a Glance 2021-2202. Family Court wedded to use of Duxbury See *HC v FW* [2018] 2 FLR 70 where care needs for future in issue But CA in *Tattershall v Tattershall* [2018] EWCA Civ 1978 acknowledged may use another method of calculation e.g. Odgen Tables (if good reason).

The workings of Duxbury

- See Notes to Duxbury Table 10 2021 Edition alert to shortcomings
- Use up to date Tables as life expectancy & tax changes factored in
- The Notes indicate do not use for widow over 74 or widower over 72 (i) may well outlive life expectancy (ii) less likely the average rates of return i.e. 3.75% pa will be experienced
- Is the C entitled to full state pension as this is embedded in the calculations
- The lump sum in the Tables required for an income of £20,000 pa is predicated on the basis that £9,339 pa of that sum comes from the State Pension.
- See Capitalise programme for more bespoke calculations.

Arguments for Ogden Tables

- Lord Hughes in *Ilott* It will very often be more appropriate, as well as cheaper and more convenient for other beneficiaries and for executors, if income is provided by way of a lump sum from which both income and capital can be drawn over the years, for example on the *Duxbury* model familiar to family lawyers: see [*Duxbury v Duxbury \(Note\) \[1992\] Fam 62*](#)
- But even *Duxbury* authors caution use for elderly Cs, and the older C's will be on the old state pension rate, so the Tables underprovide unless Capitalise used.

Difference in Ogden

- In *Re Clarke Dec* the widow would need lifelong residential care. The cost of which historically increased above the rate of general inflation. Deputy Master applied the Ogden Tables. See the 8th Edition <https://www.gov.uk/government/publications/ogden-tables-actuarial-compensation-tables-for-injury-and-death>
- The discount rate for personal injury adopted is **-0.25%** but the Tables go up to 2.5%. The Judgment does not indicate whether this was the rate applied but the Ogden Tables produced the requirement for a significantly higher lump sum.

Interim Provision and costs

- S.5 1975 Act where (a) C is in immediate need of financial assistance (b) property in the estate can be made available to meet that need. The court may make an interim order
- In *Smith v Smith* [2011] EWHC 2133 (Ch) Mann J held that an interim order could include funds for costs of the proceedings
- *Weisz v Weisz* [2019] EWHC 3101 (£4m estate) illustrates that Family Division prepared to make an order to cover costs. Francis J no reason for C to search for solicitors prepared to undertake a CFA. Awarded £55k to take case up to an FDR.

CFA issues

- A C may now be able to enter into a CFA and recover a % of the uplift or success fee charged against the D to the 1975 Act claim.
- *Hirachand v Hirachand* [2021] EWCA Civ 1498 a claim by an adult child with poor health. Her solicitors acted under a CFA. At 1st instance the Judge awarded her £16,750 towards her success fee liability. Upheld on appeal
- LJ King the payment of debts can form part of a maintenance award. So CA upheld the modest contribution of 25% only of a substantial success fee. So C still left with a debt to her lawyers.

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