

## Sidney Ross

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A specialist in chancery drafting and advisory work, he deals with trusts, wills and probate matters and administration of estates, matters concerning older clients, applications to the Court of Protection and estate planning. In particular he is very experienced in claims under the Inheritance Act, including cases which also involve claims to beneficial interests in the subject-matter of the deceased's estate or challenges to the validity of the deceased's will. He is the author of *Inheritance Act Claims - Law and Practice* (Sweet & Maxwell), the 2005 edition of which has been published for the first time in the Practitioner series. He is also a regular contributor to legal journals on family provision matters and questions of will construction. Other activities include mediaeval, Renaissance and Baroque choral singing, chess, cricket and writing verses about interesting legal topics. He was one of the three winners of the 2005 Counsel poetry competition, with a poem entitled "Tesco Law".

Reported cases include *Gold v Hill* [1999] 1 FLR 42 (secret trusts); *Singer v Isaac* [2001] WTLR 1045 (Inheritance Act claim by surviving spouse).

### Estate Planning, Trusts & Trustees

He is experienced in drafting settlements, wills, deeds of variation and disclaimers; advising on their capital gains tax and inheritance tax implications; advising on the construction of trust documentation; litigating and advising on disputes between trustees and beneficiaries.

### Probate:

His experience includes drafting probate documents and wills; advising on the construction of wills; litigation concerning the validity of wills and the failure of personal representatives to administer the estates of deceased persons according to law.

### Inheritance Act Claims:

He has extensive experience in advising on and litigating claims under the Inheritance Act, including cases which also involve claims to beneficial interests in the subject-matter of the deceased's estate or challenges to the validity of the deceased's will. A new version of his book *Inheritance Act Claims - Law and Practice*, the 2005 edition of which has been published for the first time in the Practitioner series.

### Court of Protection:

He deals with applications to the Court of Protection for statutory wills to be made for patients and for gifts to be made out of their estates, and related areas, including disputes arising out of the exercise of powers of attorney and the affairs of elderly clients, particularly those who are in, or may shortly go into, residential care.

### Sidney Ross is the author of the following books, articles and bulletins:

#### Books:-

*Inheritance Act Claims-Law and Practice*; 1st edition (1993), 2nd edition (2000); Practitioner Series edition (2005), Sweet & Maxwell

\* (as assistant author) *Law of Mortgages* by Edward Cousins, 1st edition (1989), Sweet & Maxwell

#### Articles:-

1-3. Fraudulent or wrongful trading ?(with M Beckman QC) (1991) *New Law Journal* 141, p.1744; (1992) *New Law Journal* 142, p.62; 142, p.100.

4. Claims under the Inheritance (Provision for Family and Dependents) Act 1975-Barrass v Harding and Newman-sympathy for the former spouse is not enough; Elderly Client Adviser (2001) vol 6 issue 3, p.23.
5. Will drafting and potential claims under the Inheritance (Provision for Family and Dependents) Act 1975; Elderly Client Adviser (2001) vol 6 issue 5, p.10
- 6-7. The implications of White v White for Inheritance Act claims, Part I [2001] Family Law 547; Part II, [2001] Family Law 619
8. Claims by surviving spouses under the Inheritance (Provision for Family and Dependents) Act 1975; Anyone thinking of a White Christmas ? Elderly Client Adviser (2001) vol 7 issue 1, p.28.
9. Personal representatives and claims under the Inheritance (Provision for Family and Dependents) Act 1975; TACT review (Quarterly Review of the Association of Corporate Trustees) (2002), issue 20, p.8
- 10-11. The assessment of quantum in Inheritance Act Claims; Part 1, income needs and capitalisation, Elderly Client Adviser (2002) vol 7, issue 5; p.15; Part 2, the position of the surviving spouse, Elderly Client Adviser (2002) vol 7, issue 6, p.18
12. Forfeiture clauses in wills; Journal of the Society of Trust and Estate Practitioners (incorporating the Trust Quarterly Review) (2003) vol.1., issue 1, p.7
13. Variation or revocation ?-the case of Dixit v Dixit; Trusts and Estates Law Journal (2003), No.45, p.18
14. Parnall v Hurst-a cautionary tale; Elderly Client Adviser (2004), vol.9, issue 3, p.22
15. Tesco Law (joint winner of the Summer Poetry competition); Counsel, August 2005, p.26
16. Surviving partners; Family Law Journal (2006), issue 55, p.10
17. Claims by surviving spouses; Family Law Journal (2006), issue 60, p.22
18. Challenging a will-the implications of illegal residence; Family Law Journal (2007) issue 68, p.5
19. Forfeiture-a hard Act to follow: Family Law Journal (2007), issue 69, p.8
20. I(PFD)A 1975-playing by the rules; Family Law Journal (2007), issue 70, p.7
21. 1975 Act claims by surviving spouses-the impact of Miller and Charman; Trust Quarterly Review (2007), vol. 5, issue 4, p.35
22. Inheritance Act claims-the courts' approach, Family Law Journal (2008), issue 80, p.21
23. Inheritance Act Claims-security for costs and interim debt orders, Resolution (2009) issue 137, p.62
24. Capitalisation of income needs in Inheritance Act claims: Duxbury or Ogden,, Family Law Week, 12th March 2009
25. Terms of endearment, Family Law Journal (2009) issue 90, p.22-24
26. Life after death Family Law Journal (2009) issue 91, pp.17-21

#### **Bulletins:-**

- Solicitors' Negligence: Trustee Act 2000 (with Charles Holbech), May 2001
- Family Provision and Invalidity of Wills, Spring 2002
- Invalidity of Wills, Winter 2003
- Family Provision, Autumn 2004
- Family Provision, Summer 2007

#### **Cases for Sidney Ross include:**

##### *In the Estate of JT (aka TEJS), deceased,*

1. The case concerns a preliminary issue which arose in a claim by M under S.2 of the Inheritance (Provision for Family and Dependents) Act 1975 ("the 1975 Act"), for an order that financial provision be made for her out of the estate of JT, who died on 7th November 2002. The substantive claim has not yet been finally disposed of.
2. The points of particular interest relate to the way in which:-
  - a. the court should exercise its appellate jurisdiction when the appeal involves a challenge to the exercise of a discretion; and
  - b. applications under S.4 of the 1975 Act to commence proceedings out of time should be approached, with particular

reference to the guidelines formulated by Sir Robert Megarry V-C in the leading case of *Re Salmon* [1981] Ch 167.

3. JT died on 7th November 2002 and, although he had indicated in writing that he had intended to leave all, or nearly all his estate to M, no will was ever found. In 2005, solicitors acting in the administration of his estate decided to proceed on the footing that he had died intestate. A claim on behalf of M was intimated but not actively pursued. Because the claim was not issued within six months from the date (13th October 2006) when a grant of representation to JT's estate was first taken out, it was necessary to apply under S.4 of the 1975 Act for the permission of the court to commence proceedings out of time. The merits of the substantive claim under s.2 are a matter to which the court will normally have regard when considering the s.4 application; see *Re Dennis* [1981] 2 All ER 140.
4. M was eligible to make a claim by virtue of ss.1(1)(ba) and 1(1A) of the 1975 Act since she had lived in the same household as JT, as his wife, for a period exceeding 2 years immediately before his death. The facts relevant to M's substantive claim are that they had been cohabiting in this way from 1966 until JT's death; that she had made a substantial contribution to the welfare of the family by performing the usual household tasks of cleaning, cooking, laundry and so forth, and had cared for the deceased for some years before his death in hospital from chronic obstructive pulmonary disease. At the date of issue of the claim she was 76 years of age and suffering from bowel cancer; her only income was the minimum pension credit guarantee, currently £124.05 per week and she had no capital. She had no beneficial interest in, or right to occupy the property (purchased by JT in his sole name in 1973) in which she had been living with him. The estate after payment of IHT was just over £550,000 which was amply sufficient to meet any award that the court might reasonably make to M. The beneficiaries under the intestacy were JT's 84 year old sister, L, who would take 50%, and a nephew and niece who would take 25% each.
5. The claim was finally issued on 11th November 2007 and the application under S.4 was heard in the Central London County Court on 4th July 2008. For M it was argued that she had a strong case on the merits, the estate had not been distributed, there was no evidence that any of the beneficiaries under JT's intestacy were in need of the benefits which they stood to take, and that, having regard to the overriding objective and the recent case law as to whether procedural failings justified barring a claimant from pursuing a valid claim, the application should be granted and the substantive claim allowed to proceed. It was also argued that M would be prejudiced if she was left to her remedy against her own solicitor as she would have to begin a fresh action, for which she would have to obtain public funding, and would be under pressure from her solicitor's insurers to compromise for significantly less than her claim was worth.
6. For L, who as JT's personal representative was the defendant to the claim, it was argued that M's solicitor's delay, both before and after the issue of the grant, was lengthy and inexcusable and that although no evidence of prejudice to L was before the court, it could properly be inferred that she was prejudiced by the delay and her inability to wind up the estate while the 1975 Act claim remained live. These arguments found favour with the court, and in an extempore judgment which set out the history of the delay at some length but barely addressed M's substantive case and the prejudice to her which would result from the refusal of the s.4 application, the learned Recorder dismissed the s.4 application and refused leave to appeal as it was a matter for his discretion.
7. Permission to appeal was granted on paper by Blackburne J on 14th October 2008 for the following reasons:-
  - a. Although the matter involved the exercise of a discretion, an appeal plainly had a real prospect of success given the absence of any mention in the judgment (beyond recording the defendant's concession that the claimant has "a reasonable case on the merits") of the claimant's circumstances and the prejudice that she will suffer (as set out in her witness statement) if her application for permission to apply under the 1975 Act out of time were refused; and
  - b. The absence of any obvious prejudice (beyond delay) to the defendant if the claimant's application were to be allowed.
8. The appeal was heard by a deputy High Court Judge on 15th January 2009. For M it was argued that the appellate jurisdiction should be exercised in accordance with the following principle (for which see Lord Woolf MR in *Phonographic Performance v AEI Rediffusion Music Ltd* [1999] 2 All ER 299 at 314, cited by Brooke LJ in *Price v Price (t/a Poppyland Headware)* [2003] 3 All ER 911, at 918j):-

'Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or not taken into account some feature that he should, or should not have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale'
9. On this point L relied on the following, from Lord Hoffman's speech in *Piglowska v Piglowski* [1999] 3 All ER 632,

at 643j-644a:-

“The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes. The reasons should be read on the assumption that, unless he has demonstrated to the contrary, the judge knew how he should perform his functions and which matters he should take into account.”

10. It was also argued for M that the overriding objective of disposing of cases justly required that the approach to an application to disapply a time limit should be the same, whether the time limit was provided by a statute or a rule of court. This argument arose because the following passage from *Re Salmon* at 175B suggests otherwise:-

“the onus lies on the Claimant to establish sufficient grounds for taking the case out of the general rule, and depriving those who are protected by it of its benefits. **Further, the time limit is a substantive provision laid down in the Act itself, and is not a mere procedural time limit imposed by rules of court which will be treated with the indulgence appropriate to procedural rules.** The burden on the applicant is thus, I think no triviality: the applicant must make out a substantial case for it being just and proper for the court to exercise its statutory discretion to extend the time”.

11. Applying the following passage from the judgment of Ormrod J in the 1975 Act case of *Adams v Schofield* (which, although decided by the Court of Appeal on 26th July 1981, was not reported until it appeared at [2004] WTLR 1049), the learned deputy High Court Judge was not prepared to hold that *Re Salmon* imposed any higher burden on M than that imposed by the Civil Procedure Rules. At 1058F-G Ormrod LJ had said:-

“I think we should start from the principle that all limitation periods are intended to promote justice and not injustice, and where there is a discretion, or where Parliament has created a discretion to adjust the limitation period, the object of Parliament is to give the court power to adjust the balance of interest between the parties so as to avoid, so far as possible, the totally artificial situations which all the time limits sooner or later give rise to.”

12. On considering the judgment below and the reasons for allowing the appeal given by Blackburne J, the learned deputy High Court judge was not satisfied that the factors had been balanced fairly in the scale. There was no indication in the judgment below that M’s case, or the prejudice to her if the application were refused, had been considered. Accordingly, he held that he could, and should exercise the discretion afresh.
13. Comparing the prejudice to the respective parties he found that, while it was a very bad case of delay by M’s solicitor, her remedy against him would not adequately compensate her for the strong prejudice that refusal of her application would entail. That strong prejudice had to be balanced against the ordinary prejudice to L resulting from the delay. Accordingly, subject to submissions as to how the claim would be promptly proceeded with from then on, the appeal was allowed so that the substantive application could proceed, and the order of the court below (including the costs order against M) would be set aside. Costs would be costs in the claim.

### *Richards v Powell*

This was a claim by R for reasonable financial provision out of the estate of the deceased (CP) who died intestate on 11.10.05, survived by his widow (H) and two sons, aged respectively 24 and 21 at the date of the trial, and leaving estate valued at £219,430. In addition to her entitlement under CP’s intestacy, she benefited from CP’s occupational pension and from a policy of life assurance which fell into his estate although it appears that it had been intended to be taken out for R’s benefit. H was also due to retire shortly and would receive an occupational pension on retirement.

The claim was under S.1(1)(e), R claiming to be a person who had been wholly or partly maintained by the deceased, otherwise than for full valuable consideration, immediately before the date of his death. Administration of CP’s estate was granted on 11.1.06 and the claim was issued shortly before the expiry of the 6-month period from that date. It was heard over three days in the Bristol District Registry during November 2007. Sidney was instructed on behalf of the Defendants in October 2007, their case having up till then been conducted by local counsel.

CP had ceased to live with H temporarily in 1993 and permanently in about 1996, though he visited her from time to time. During that period he had formed a relationship with R but refused to divorce his wife as R wished him to do. R had herself been divorced in 1994 and there was a daughter of that marriage, born in April 1993.

The history of the relationship between CP and R falls into four parts. From May 1996 to about July 1998 they were not living together and apart from the last six months or so of that period he was not supporting her. During that period she was living in her former matrimonial home and she continued to do so until December 2001. She claimed to have been supporting him between August 1998 and December 2000. Between December 2001-February 2004 she was living with him at a property (“16BD”) purchased by him with the aid of a mortgage, and was not paying rent. She then left, for reasons connected with difficulties over her daughter’s schooling, moved into rented accommodation in March 2004, and did not move back to 16BD at the end of the school year. At the end of the year there was a quarrel arising from his continued refusal to divorce H and they each entered into relationships with other partners but these were short-lived. Although, so R asserted, they were reconciled and plans were made for her to return to 16BD and for work

to be done on it in anticipation of her return, she continued to live in rented accommodation and was doing so when CP died, without those plans having been put into effect.

The crucial question for the Court was whether CP had been maintaining R immediately before his death. The relevant law states that in determining whether the Claimant was being maintained by the deceased immediately before his death, the Court is not to confine its attention to that period but to consider the totality of the relationship. In *Gully v Dix* [2004] WTLR 331 at 335B-337E, paragraphs 10-18, the Court of Appeal approved the following dictum of HH Judge Weeks QC at first instance, viz that the court must look at:-

“the settled state of affairs during the relationship between the parties and not the immediate de facto situation prevailing before the deceased’s death...”

The provision of rent-free accommodation would generally be regarded as a substantial contribution to the reasonable needs of the claimant for the purposes of S.1(3) of the 1975 Act, but that had ceased some 19 months before CP’s death. It was R’s case that apart from two months in the spring of 2005, CP had been paying her rent in the various properties which she successively occupied during those 19 months, and that in view of the plans which she and CP had made for their future together, reasonable provision for her would be such as to provide her with a home for her life. Oral evidence in support of R’s case was given by the owners of the rented properties and by J, a professional colleague of CP who knew him very well and was also well acquainted with R.

For the Defendants it was contended that CP’s financial records were not consistent with his having made regular payments of R’s rent; but if the Court nevertheless found that such payments had been made, CP should be taken to have assumed responsibility for her maintenance only on a temporary basis and that, in view of his history of making promises which he had not performed, the plans for them to resume living together in CP’s home would not have been implemented. R had at least another ten years of working life and her earning capacity was such that she could meet her reasonable income needs (including the cost of suitable rented accommodation) if she were freed from the burden of debt and also from the necessity to take on additional work while her daughter is under 18. Any provision ordered by the Court should be limited so as to bring about that result.

The Chancery District Judge said at the conclusion of the trial that it was a difficult case, and reserved judgment. In that judgment he found for R on both issues. CP’s financial records were incomplete as there were some accounts for which it had not been possible to obtain statements, so the records produced were not conclusive that CP did not have the resources to make the payments. There was oral evidence that immediately after CP’s death, R was experiencing difficulty in paying her rent, which had not previously been the case. On the question whether CP and R had been reconciled and intended to resume living together permanently in CP’s home, J’s evidence was decisive in R’s favour. Accordingly R was awarded £150,000 absolutely, out of which to purchase a property for her own use and occupation, the payment to be made (in accordance with H’s instructions that her sons’ interests in the estate be preserved as far as possible) out of H’s entitlement to CP’s intestate estate.

### *Smith v Green*

This was another case which I had to take on at short notice when other counsel had had the conduct of it for over a year. Mr Smith, who was 80 years of age, claimed financial provision out of the estate of June Margaret Bell, who had died intestate on 20th September 2004 aged 72. Mrs Green, who was 68 years of age, was her half-sister and the only person entitled to take on her intestacy. Letters of administration were granted to her on 28th September 2006. The net estate consisted of £71,352 in cash and the leasehold flat occupied by the deceased for which local estate agents had recommended asking prices in the range £155,000-£185,000.

Mr Smith’s case was that he had enjoyed a relationship with the deceased from 1995 or 1996 until her death and that, for a period in excess of two years immediately before her death, he lived together with her in the same household as husband and wife, thereby satisfying the requirements of sub-Ss.1(1(ba) and 1(1A) of the Inheritance (Provision for Family and Dependants) Act 1975. He claimed to have cared for the deceased during the period following the mastectomy which she underwent in mid-2002 and up to her death, stating that she was living at his address during that time, except when she was in hospital or other care.

He also produced documents evidencing the deceased’s intention to make a will in his favour but the will drafted in 1998 was never executed, and a subsequent will questionnaire apparently completed by her was never followed up. The deceased executed an enduring power of attorney in his favour on 6th January 2002 in relation to all her property and affairs, and it was registered with the Court of Protection on 6th April 2002. In that instrument she expressed the wish that her family should not (except as she should specify) inherit her estate but she took no steps to implement that wish. Her bank statements for the period 3rd April 2002-20th August 2004, that is, after the execution of the power of attorney, showed withdrawals from her funds to the extent of £69,291.90, including one sum of £40,358.09 on 11th December 2003, which Mr Smith stated was a gift to him.

In negotiations shortly after the claim was first intimated, Mr Smith offered to settle his claim for £100,000. That offer was rejected. In January 2008, shortly before the trial of the claim was due to commence, he provided a witness statement and an updated financial statement showing his expenditure for the year 2007 as £12,069, but not giving details of his income other than that he was receiving a State retirement pension. He owned his home as tenant in common in equal shares with his daughter and was not paying an occupation rent in respect of his enjoyment of her beneficial share, so no provision needed to be made for his housing costs.

In offering to settle his claim, we assumed that he was currently receiving the amount of £119.05 per week (£6,190 per year) representing the standard minimum guarantee for 2007-08, leaving an annual income shortfall of £5,879, and he did not make any assertion to the contrary. At age 80 last birthday, his actuarial life expectancy according to the then current interim life tables (2003-5) was 7.45 years. We assumed in his favour that that life expectancy was not reduced by the heart condition to which he referred in his witness statement. Using the Ogden Tables (6th edition, May 2007-Table 28, multipliers for pecuniary loss for term certain) and assuming the conventional net rate of return of 3.75%, the appropriate multiplier was 6.51. Applied to a annual shortfall of £5,879, that multiplier gave a sum of

£38,272. Sidney Ross's recent article in Family Law Week demonstrates that calculations based on the Ogden tables are just as appropriate as Duxbury calculations for capitalising annual income needs in circumstances such as existed in this claim.

Although it would not, strictly speaking, fall within the description of "maintenance" in *Re Dennis*, [1981] 2 All ER 140, at 145, that "maintenance connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever rate is appropriate to him", we accepted that Mr Smith might from time to time incur expenses such as car repairs and the replacement of household items, and therefore we proposed to provide a modest capital sum for those contingencies, in addition to the calculated amount of £38,272. A figure of £4,228 for that contingency fund was thought adequate, bringing the total provision up to £42,500. That offer, which was made in accordance with CPR Part 36, was accepted, so Mr Smith was also entitled to his costs on the standard basis.

### *Mallidi v Snowden*

In this case Sidney acted for the Defendants, the three adult children of Derek Graham Snowden who died in a road traffic accident on 28th December 2004, intestate. They were the only persons entitled to take on his intestacy, and letters of administration were granted to the First Defendant ("Daniel") on 3rd March 2006. The value of Mr Snowden's estate was certified on the grant of letters of administration as £462,332 gross, £319,769 net. The other resources which became available as a result of his death were benefits under his occupational pension scheme. The lump sum death benefit of £149,859.56 was paid to his estate, but following her submission of the necessary declaration, the First Claimant was awarded a dependant's pension of £9,764 per year, index-linked. At the time of the claim, in August 2006, the pension was being paid at the rate of £725 per month, equating to £8,700 per year, presumably net of basic rate income tax.

There were two claimants. The First Claimant was Mrs Mallidi, who claimed in the alternative as a cohabitant in accordance with sub-Ss.1(1)(ba) and 1(1A) of the 1975 Act, and as a person being wholly or partly maintained by the deceased immediately before his death, in accordance with sub-S.1(1)(e). The Second Claimant, who was born on 28th July 1985, was the daughter of the First Claimant by her marriage to Rama Mohana Reddy Mallidi, which was dissolved by decree absolute on 4th October 1999. Her claim was on the basis that Mr Snowden was maintaining her before she went to University and in 2003-04 while she was at Bangor University. There is authority that in such circumstances there is no compelling reason for the Court to make provision for her subsequent maintenance. In *Hocking and another v Hocking* (unreported, 12th June 1997) the Court of Appeal upheld the decision of the trial judge not to order provision for the adult daughters of the deceased over and above what was reasonable for their maintenance while they were still in higher education.

In addition to her claim under the 1975 Act, the First Claimant made a claim as a dependant under the Fatal Accidents Act 1976 which was settled on 19th April 2007 in the sum of £328,000. It was not apportioned between herself and her children. She also made a claim for damages for personal injuries suffered by her in the same accident which had not been settled by February 2008, shortly before her 1975 Act claim was due to be heard. At that time she had £200,000 of that sum invested and, at age 48, the sum of £200,000 would have funded a net income need of £11,633 which, added to her dependant's pension, equated to an annual income of approximately £20,000. Her daughter was not dependent on her, and she had significant earning capacity; she had worked in a number of jobs, including the running of a bed and breakfast establishment in a property at 9 Park Road, Rugby, which she claimed to have been purchased partly with joint savings but which was owned by Mr Snowden. At no time did she intimate a claim to a beneficial interest in that property.

The First Claimant did not adduce any evidence that her financial resources were inadequate to cover her daily living costs other than her housing costs. She had no security of tenure in 9 Park Road so, on the face of it, she had a case that her housing needs should have been provided for out of the deceased's estate. However, although at the time of Mr Snowden's death she owned another property in Rugby, at 41 Manor Road, she transferred it, apparently for no consideration, to her brother, who was registered as sole proprietor on 26th January 2005. In her witness statements she gave two wholly inconsistent accounts of the reasons for that transaction. It is well settled that the court is entitled to take into account improvident behaviour by a claimant and reduce an award accordingly, or dismiss the claim; see *Re Farrow* [1987] 1 FLR 205, *Rhodes v Dean* (Court of Appeal, unreported, 28th March 1986) and *Robinson v Fernsby and anor* [2004] WTLR 257, CA.

The claim did not go to trial; the parties entered into an agreement as to the disposition of various chattels and the terms on which Mrs Mallidi would be permitted to buy 9 Park Road out of the deceased's estate, but she did not receive any monetary payment.

### *Bush v Rogers*

Ellen Louisa Bush died on 21st August 2006, survived by her daughter, the Claimant in the proceedings. Her husband had died on 13th September 2005. She had had relatively little contact with the Claimant for some years, but her two sisters, Patricia and Pamela, had helped to look after her and her husband since about 1995. Shortly before Mrs Bush's death arrangements had been put in train for her and her sisters to sell their respective properties and buy a house for their joint occupation, but this fell through as the Claimant took it upon herself to take her mother's house off the market.

By her will, made on 18th August 2006, Mrs Bush appointed her sisters to be her executors and trustees, and left her estate (£178,074 gross, £157,511 net) to them in equal shares. Had she not done so, she would have died intestate and her daughter would have been the sole beneficiary under the intestacy. The daughter was initially minded to contest the will (which included a statement of the reasons why she had been excluded from taking any benefit under it) in addition to making a claim under the 1975 Act, but eventually agreed to enter into negotiations to settle the 1975 Act claim on the basis that the validity of the will was not challenged. Following a case management conference on 17th June 2008, at which the District Judge expressed the view that this was a case of competing needs, the Defendants made a Part 36 offer.

At the time of the offer, the Claimant was 54 years of age and had both mental and physical disabilities within the meaning of S.3(1) (f) of the 1975 Act. There had been a history of psychiatric disturbance and she also suffered from chronic obstructive pulmonary disease. Her income was derived entirely from non-means-tested State benefits and she had no home of her own. For some time she had been living with a Mr S but it was expected that that arrangement would cease when her claim had been disposed of. She put forward her claim on the basis that reasonable provision for her would be the purchase of a modest home for her absolutely.

The Defendants were, respectively, 70 and 66 years of age with a combined annual income, derived from State and occupational pensions, of £15,447. They owned their house, worth £110,000 but in need of considerable repair and replacement of major household items, which would absorb such of their savings as had not been used up in the litigation. Over their respective life expectancies of 19 and 22 years, it was probable that inflation would reduce the purchasing power of their incomes and they would need a capital reserve to cover that and other contingencies such as the need for further repairs and replacements.

The Defendants' Part 36 offer was put forward on the following basis:-

(1) It was not reasonable that they should be placed in danger of financial hardship in old age, particularly in view of their obvious moral claim, arising from their care and attention to her, to some benefit from the deceased's estate.

(2) Their needs could be met by a capital sum representing the cost of topping up each of their incomes by a further £1,000 per year and a contingency fund to cover items such as further repairs and replacements of major household items over the next 20 years.

(3) Using the Ogden Tables (Table 28, 6th edition, May 2008) and assuming the conventional net rate of return of 3.75%, the cost of the respective income top-ups would be £13,070 for the older sister and £15,080 for the younger sister. Adding to this a contingency fund of £25,000 gave a total of £53,150, leaving just over £100,000 out of which to make provision for the Claimant.

(4) The Claimant's housing needs could be adequately met by the purchase of a 1-bedroom flat. Internet searches revealed that such accommodation in the where she was currently living was obtainable for as little as £80,000. Therefore, a payment of £100,000 would be sufficient to meet her reasonable housing needs and would leave a sufficient sum out of the fund available for distribution to meet the Defendants' needs as explained in (1)-(3) above.

The Part 36 offer was accepted.

### *Knott v Day [2005] EWHC (CH) 484, [2005] All ER (D) 147 (Apr)*

Sidney Ross appeared for Mr Knott in a triangular family dispute relating to two property transactions between him and the woman with whom he co-habited for a limited period.

Mr Knott and Mrs Day met on holiday when each of them was sole legal and beneficial owner of a property. Some months later they decided to sell their properties and buy a third in which they would live together. Mr Knott's son, J, strongly disapproved of the relationship but the parties went ahead.

A property (7 Manor Garth) was bought in their joint names as beneficial tenants in common in equal shares. The relationship became difficult and they decided that Mrs Day would buy out Mr Knott's share of Manor Garth and become its sole owner, and that Mr Knott would buy another property (10 Ensign Close) of which he would be sole owner.

They would try to keep the relationship in being but, if it failed, they would each have a home of their own. Mrs Day initially paid Mr Knott £40,000 for his half share of Manor Garth and made some further payments subsequently. Some two years later, Mr Knott transferred Ensign Close, for no consideration, into the joint names of himself and Mrs Day as beneficial joint tenants. The purpose of this was to provide Mrs Day with some protection in the event that Mr Knott predeceased her. The relationship finally broke down in the following year. Mr Knott ceased to live with Mrs Day and, having become reconciled with his son J, went to live permanently at Ensign Close and severed the beneficial joint tenancy.

Mrs Day applied in the County Court under s.14 of TLATA for an order for sale of 10 Ensign Close. Mr Knott began separate proceedings in the High Court for a declaration that the transactions whereby his half share of Manor Garth was transferred to Mrs Day and Ensign Close was transferred into the joint names of himself and Mrs Day were procured by Mrs Day's undue influence and should be set aside. He claimed that he had reposed trust and confidence in Mrs Day, that she was the dominant party in the relationship and that the transactions were so financially disadvantageous to him as not to be explicable by reference to the relationship.

Mrs Day's claim for an order for sale was consolidated with Mr Knott's claim.

The High Court judge held that:

The parties reposed trust and confidence in each other. The transactions were not procured by the undue influence of Mrs Day, but were readily explicable in terms of their own relationship and the antipathy which Mr Knott had developed towards his son because of his attitude to that relationship.

Mr Knott had received only £62,750 for his half-share in Manor Garth, substantially less than its full value and should receive £17,250 by way of equitable compensation. This finding followed a fairly complex equitable accounting exercise undertaken by Sidney Ross.

Mrs Day had made no contribution to the purchase price of Ensign Close. It was never intended as a home for her and Mr Knott, nor did the parties intend that she should have the power to force a sale of it during Mr Knott's lifetime. She held her beneficial interest as bare trustee.

Following the judgment and after further negotiation, it was ordered by consent that the claim to have the transactions set aside for undue influence, and the claim for an order for sale of Ensign Close both be dismissed; that Ensign Close be transferred back into

Mr Knott's sole name; that Mr Knott would abandon all claims for equitable compensation in respect of his half share of Manor Garth; and that there be no order for costs.

### *Sykes (DJ) v Sykes (JN)*

The parties are two brothers who were appointed joint executors of their mother's will. Following her death in January 2005, a dispute arose between them as to whether the grant of probate should be issued to them jointly (as DJS wished) or to JNS with power reserved to DJS to come in and prove the will at a later date. Another dispute was whether (as JNS asserted) the late Mrs Sykes had promised to reimburse him the sum of £14,000 loaned to him by Barclays Bank to fund his professional studies. DJS disputed whether any such promise had been made and, if so, whether it was enforceable, having been made in circumstances where it would be presumed that the parties did not intend to enter into legal relations, and apparently for no consideration.

On 20th July 2005 DJS received a form (PA 25) from JNS' solicitors. This is a form issued by the Probate Registry when an application is made for a grant with power reserved and the purpose of sending it is so that the person to whom power is to be reserved confirms that he is willing for the grant to be issued in that way. DJS was not prepared for this to be done and did not sign the form. Nevertheless JNS applied for a grant to be issued to him with power reserved to DJS and (contrary to the normal practice of the Probate Registry when a signed PA 25 has not been returned) the grant was issued on 16th September 2005.

In the course of his application JNS swore in the executor's oath (as is required in such circumstances) that notice of his intention to apply for a grant with power reserved had been given to DJS, when in fact no notice had been given. The giving of such notice is mandatory unless the registrar or district judge has dispensed with consent; see *Tristram & Coote's Probate Practice* (29th edn., 2002), at paras. 4.52-53. It is clear from the form of notice at Form 65, p.1037 of *Tristram & Coote* that the form PA 25 is not a notice for this purpose.

In view of this and of the dispute about the debt, I advised DJS that proceedings should be commenced under s.50 of the Administration of Justice Act 1985, under which the court has power to remove a personal representative, for an order that JNS be removed and replaced by an independent executor.

The trial was due to take place during the last week of May 2006, but the case settled on the Friday of the previous week, on terms that JNS agreed to his replacement by an independent executor to be nominated by DJS and to pay £50,000 towards DJS' costs; the parties also agreed that the independent executor should decide whether the amount of the disputed debt should be paid to JNS out of the estate.