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# Family Provision

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**Note:-** *The material in this bulletin draws substantially on articles which appeared in nos. 55 (April 2006) and 60 (October 2006) of the Family Law Journal, published by Legalease, and on further articles submitted for publication in the same journal later this year.*

## **Introduction**

Since the last bulletin on this topic, there have been important developments in the law relating to family provision, by way of both primary legislation on the coming into force of the Civil Partnership Act 2004, and case-law. The most prolific sources of fully reported case-law continue to be the Wills and Trusts Law Reports (published by Legalease) and the Family Law Reports (published by Jordans). The case-law has developed in four areas, namely, status, practice and procedure, statutory interpretation and awards to individuals, particularly surviving spouses and adult children. The structure of this bulletin reflects those areas of development. A list of cases discussed follows each section; citations for those reported for the first time since the appearance of the last bulletin on this topic are in bold italics.

## **Section 1-an overview of the Civil Partnership Act 2004**

### **1.1 Recognition of same-sex relationships**

CPA 2004 came into force on 5 December 2005. It is the second statute to have

increased substantially the number of potential claimants under the 1975 Act. However, it is a much more wide-ranging piece of legislation than the Law Reform (Succession) Act 1995, both because of its aim and because of the variety of relationships to which it applies. Its aim is to put parties to civil partnerships (as defined by s.1) in the same position as parties to a marriage. In doing so, it extends the range of eligible claimants not only to parties to civil partnerships, but also (as discussed under the heading "To whom is the 1975 Act extended") to parties to secondary relationships; that is to say, former and quasi-civil partners, and persons who are, in civil partnership terms, the equivalent of step-children. This contrasts with the 1995 Act, which made opposite-sex cohabitants eligible, but not parties to any kind of secondary relationship. Thus, the 1995 Act did not assist mistresses discarded by the deceased before his death, nor children of the applicant who had been treated by the deceased as if they were children of the cohabitation relationship (though such children might have been able to claim as dependants under s.1(1(e)).

CPA 2004, s.71 provides that Schedule 4 amends enactments relating to wills, administration of estates and family provision so that they apply in relation to civil partnerships as they apply in relation to marriage. It is vital to appreciate that mere cohabitation by same-sex partners does not create a civil partnership, though same-sex cohabitants who are not civil partners but who fulfil the new statutory conditions are eligible to make a 1975 Act claim.

CPA 2004, s.1(a)(i-iii) defines a civil partnership as a relationship between two people of the same sex ("civil partners") which is formed when they register as civil partners of each other in England and Wales, Scotland or Northern Ireland

under the appropriate Part of CPA 2004. There are special provisions for parties registering outside the United Kingdom.

## **1.2. Who may be civil partners ?**

CPA 2004 deals with this by specifying those who cannot be civil partners. Section 3 provides that two people are not eligible to register as civil partners of each other if (a) they are not of the same sex; (b) either of them is a civil partner or lawfully married; (c) either of them is under 16, or (d) they are within the prohibited degrees of relationship. Sch. 1, Part 1 sets out two classes of prohibited degrees of relationship, viz., absolute and qualified. The absolute prohibition applies where one person is the grandparent, parent, child (including adoptive or former adoptive child) or grandchild of the other, or a sibling, a sibling of the parent or the child of a sibling of the other. "Sibling" includes half-blood relationships. The qualified prohibition applies where one party is the former civil partner or spouse of the other's parent or grandparent, or is the child or grandchild of a former spouse or civil partner of the other. It operates unless both parties have reached the age of 21 at the time when they register as civil partners of each other and the younger has not at any time before reaching the age of 18 been a child of the family in relation to the older.

## **1.3. To whom is the 1975 Act extended ?**

The amendments to the 1975 Act take up the major part (paragraphs 15-27) of Part 2 of Sch.4. The enlargement of the eligible classes is effected by paragraph 15. It amends sub-ss.1(1)(a) and (b) of the 1975 Act (relating, respectively, to

surviving spouses and to former spouses who have not remarried) so as to include (a) a spouse or civil partner of the deceased and (b) a former spouse or civil partner of the deceased, but not one who has formed a subsequent marriage or civil partnership.

Same-sex cohabitants are brought within the scope of the 1975 Act by the amendment to s.1(1)(ba) (which extended it to opposite-sex cohabitants) and the insertion of a new sub-s.1(1B). This mirrors the existing sub-s.1(1A) by applying sub-s.1(1)(ba) to persons who had lived for the whole of the period of two years immediately before the death of the deceased in the same household as, and as the civil partner, of the deceased.

Sub-s.1(1)(d) has been amended by inserting the words “or civil partnership” after “marriage” in the two places where the latter occurs. The effect of this is that a person whose parent (B) has formed a civil partnership with A, and whom A has treated as a child of the family in relation to the civil partnership, can now claim for financial provision out of A’s estate.

Under sub-s.25(4) of the 1975 Act as originally enacted, any reference to a wife or husband was treated (subject to conditions) as including a reference to a person who has in good faith entered into a void marriage with the deceased. This sub-section has been amended, and sub-s.25(5) replaced by sub-ss. 25(4A), (5) and (6), so as to make corresponding provisions in relation to civil partners.

#### 1.4. Provisions relating to civil partners

The provisions which will in practice be most relevant are those introduced by paragraphs 15(6), 17 and 21 of Schedule 4. Paragraph 15(6) inserts a new sub-s.1(2)(aa) which defines the same standard of reasonable financial provision for a surviving civil partner as for a surviving spouse. Paragraph 17 amends s.3(2) by directing the court, in the case of an application by a surviving civil partner, to have regard to the provision which the applicant might reasonably have expected to receive if, on the day when the deceased died, the civil partnership had instead been terminated by a dissolution order.

Sub-s.2(1)(f) of the 1975 Act gave the court power to vary ante-nuptial or post-nuptial settlements. Paragraph 16 of Schedule 4 adds a sub-s.2(1)(g), which, correspondingly, enables the court to make orders varying any settlement made during the subsistence of a civil partnership formed by the deceased, or in anticipation of the formation of a civil partnership by the deceased.

Of the amendments to the part of the 1975 Act which makes special provisions in cases of divorce, separation, etc, the most important in practice is likely to be the new s.15ZA (inserted by paragraph 21) which gives the court power to order, on the termination of a civil partnership, that neither party, on the death of the other, shall be entitled to apply for an order under s.2 of the 1975 Act. Other new provisions in that part are ss. 14A, 15B and 18A (inserted, respectively, by paragraphs 20, 22 and 25) which correspond, in relation to civil partnerships, to the existing ss. 14, 15A and 18. The definition of “maintenance agreement” in sub-s.17(4) is amended by paragraph 24 so as to include agreements made by a party to a civil partnership.

### 1.5. How might the law of family provision develop ?

In some areas we can reasonably expect the case-law to develop as it has done in the thirty years since the 1975 Act came into force. The normal practice of including s.15 provisions in orders made in ancillary relief proceedings (as to which, see *Cameron v Treasury Solicitor* [1996] at p.723 per Thorpe LJ) should be followed in the civil partnership context, under the power contained in s.15ZA, with the result that claims by former civil partners who have not remarried or formed another civil partnership should be rare. In relation to such claims *Re Fullard* [1982} and *Barrass v Harding* [2001] will no doubt continue to apply.

As to same-sex cohabitants, the approach of Neuberger J in *Re Watson* [1999] to the question whether the parties were living together as husband and wife (i.e., that it should be determined by asking whether, in the opinion of a reasonable person with normal perceptions, the parties were living together as husband and wife) will presumably be followed as far as possible, though one may wonder what the reasonable person with normal perceptions would perceive (or be seen by the court as perceiving) to be the indicia of living together as civil partners.

Applications under s.1(1)(d) have been rare so far but we may anticipate that the only two reported cases (*Re Callaghan* [1985] and *Re Leach* [1986]) will be followed in applications under the amended provision.

It is in relation to applications by surviving civil partners that the development of the case-law may well be least predictable. Given that the purpose of CPA 2004 is to assimilate, in relation to inheritance rights, the positions of parties to marriages and to civil partnerships, this might seem a surprising prediction.

However, the matrimonial statute and case-law (by which the 1975 Act and the case-law in relation to s.3(2) is strongly influenced) owes much of its recent development to the efforts of Parliament and the judiciary to redress the balance between the (usually male) breadwinner and the (usually female) homemaker. Judgments in both those spheres of law have emphasised the need to approach questions of financial provision in a fair and non-discriminatory manner; see *White v White* [2001] and the 1975 Act surviving spouse cases of *Fielden v Cunliffe* [2006] and *P v P, P and G* [2006], which are reviewed in section 5.1 of this bulletin.

#### Cases

*Re Watson* [1999] 1 FLR 878

*Cameron v Treasury Solicitor* [1996] 2 FLR 716, CA

*Re Fullard* [1982} Fam 42, CA

*Barrass v Harding* [2001] 1 FLR 138, CA

*Re Callaghan* [1985] Fam 1

*Re Leach* [1986] Ch 226

## Section 2-status

### 2.1. Introduction

It is a threshold condition for a claim under the 1975 Act that the deceased died domiciled in England and Wales. In the divorce case of *Mark v Mark* [2006] the House of Lords decided that a person within the jurisdiction who was an illegal overstayer was not thereby debarred from acquiring a domicile of choice within that jurisdiction. In *Cyganik v Agulian* [2006] the Court of Appeal considered in detail the principles governing the acquisition of a domicile of choice. In *Witkowska v Kaminski* [2006] the question was whether the claimant, who claimed as a cohabitant under sub-s.1(1)(ba) and as a dependant under sub-s.1(1)(e) was eligible to make a claim when her presence in England during the two-year period immediately before the death of the deceased was illegal.

### 2.2. Domicile

#### 2.2.1 The domicile issue in *Cyganik v Agulian*

In *Cyganik v Agulian* and others, the claimant, Miss Cyganik, had been left £50,000 out of an estate whose net value in the United Kingdom was sworn at £6,527,362. However, the trial and subsequent appeal were entirely concerned with the preliminary issue of whether the testator, Mr Andreas Nathanael, who was born in Cyprus in 1939, was domiciled in England and Wales on 17th February 2003, the date of his death.

#### 2.2.2. Facts

Mr Nathanael lived in Cyprus until about 1958; he then came to London, where he lived until 1972. After some two years of living in Cyprus, he returned to London in 1974 (the year of the Turkish invasion) and lived there for the rest of his life, returning to Cyprus only for visits which became less frequent as time went on. From 1974 onwards he built up a hotel business in London and also formed a relationship with a Mrs Johnson which lasted from 1977 to 1992, and of which a daughter was born. However, he remained emotionally very strongly attached to Cyprus and spoke frequently of buying or building property there, which caused Mrs Johnson to feel sufficiently insecure to leave him and support herself and her daughter by her own efforts and without assistance from him. From 1996 onward he built up a substantial balance in his bank account in Cyprus, which stood at £1.3M at his death; and during his last significant visit to Cyprus in 2001-02, he told his bank manager of his intention to retire to Cyprus and asked for his help in finding a property, though nothing came of this in the end.

Miss Cyganik, who is Polish, had come to England in 1992 on a student visa and was an illegal overstayer; however, the illegality of her presence in England was of marginal relevance in the context of the trial. She was initially engaged by Mr Nathanael as a cleaner in a hotel owned by him, but she attained a more responsible position and a stable relationship developed between them. The issue whether they later became engaged to be married was hotly contested. Her case was that on her 27th birthday, in 1999, they agreed to marry, and that the

preparations made during 2002 would have culminated in a marriage at Easter 2003. The trial judge found as a fact, and the Court of Appeal upheld the finding, that the parties would have married had Mr Nathanael not died unexpectedly.

### 2.2.3 Inferences from the facts

The Court of Appeal differed from the trial judge as to what inference could legitimately be drawn from that finding. The trial judge had found difficulty in identifying Mr Nathanael's intentions and expressed the view that, had he not formed a permanent relationship with Miss Cyganik, he might well have decided to sell up and go to live permanently in Cyprus. However, he concluded that at some time between 1995 when the deceased made his will (under which Miss Cyganik was the only non-family beneficiary) and 1999, when she understood that she had obtained a commitment to marriage, Mr Nathanael formed the intention to reside in England and Wales "permanently or indefinitely", and declared accordingly.

In his exposition of the legal principles relating to domicile, Mummery LJ cited the judgment of Scarman J (as he then was) in *In Re Fuld (no.3)* [1968] which, he said, was in terms that the Court of Appeal should expressly approve. Although words suggestive of a higher standard of proof have often been used, Scarman J's judgment makes it clear that the standard of proof is the civil, not the criminal, standard. Mummery LJ held that

- (1) In order to decide whether the deceased had acquired a domicile of choice at the date of his death, the court had to look at "the whole of [his]

life, at what he had done with his life, at what life had done to him, and at what were his inferred intentions..."

- (2) Special care must be taken in the analysis of evidence about isolating individual factors present over time and treating a particular factor as decisive. In that regard, the authorities support the proposition that if H with a domicile of origin in country A marries W with a domicile in country B and lives with her in B after the marriage, H does not as a matter of law thereby acquire a domicile of choice in country B and abandon his domicile of origin.

He had earlier observed that, in a case of proof of the subjective intentions of a person who has died, little weight is attached to direct or indirect evidence of statements or declarations of intention by that person. Subjective inferences had to be ascertained by the court as a fact by a process of inference from all the available evidence about that person's life.

He concluded that had the judge taken into account all the connecting factors with Cyprus and England over the whole of the deceased's life, he would have found that the evidence was not sufficiently cogent and convincing to establish such a serious matter as a change of domicile. As Longmore LJ put it in his analysis of the trial judge's judgment, the question was not so much whether the deceased intended to return permanently to Cyprus, as whether it had been shown that, by the date of his death, he had formed the intention permanently to reside in England. The crucial point was that he had a domicile of origin in Cyprus until it was proved that he intended to reside permanently or indefinitely in England.

#### 2.2.4 Illegal presence and the acquisition of a domicile of choice

This question was considered on appeal in *Witkowska v Kaminski*, where the approach of the House of Lords in *Mark v Mark* (2006) was adopted. *Mark v Mark* was concerned with the question whether an English court had jurisdiction under s.5(2) of the Domicile and Matrimonial Proceedings Act 1973 to entertain a petition for divorce when the petitioner had been an illegal overstayer at, and for the 12 months immediately before, the issue of the petition. The requirements were that one of the parties was either:-

- (a) domiciled in England and Wales on the date when the proceedings were begun; or
- (b) habitually resident in England and Wales throughout the period of one year ending with that date

The House of Lords held that residence for the purpose of s.5(2) did not have to be lawful and there was no need to imply the word 'lawfully' into the requirement. The purpose of the provision was to provide an answer to the question whether the connexion with England and Wales of the parties and their marriage was sufficiently close to make it desirable that domestic courts should have jurisdiction to dissolve the marriage. The concept of domicile was a neutral rule of law for determining the system of personal law with which an individual had the appropriate connexion. Recognising the connexion despite the illegality of the person's presence did not offend against any principle that a person could not be permitted to acquire a benefit from his own criminal conduct. If X had acquired a domicile of choice, it was not to be denied because the court

considered X's case to be unmeritorious or tainted with legal or moral turpitude.

*Witkowska v Kaminski* was concerned, not with the court's jurisdiction to entertain a 1975 Act claim, but with the claimant's eligibility to make one. Applying the *Mark v Mark* approach, the question whether W had lived in the same household as the deceased for the relevant period would be a question of fact which was not dependent on whether she was an illegal overstayer. The purpose of the 1975 Act jurisdiction was to recognise the financial claims against a deceased's estate of persons closely related to, or financially dependent on him. Blackburne J held that, just as the wife's unlawful presence in this country in *Mark v Mark* did not debar her from establishing habitual residence and domicile for the purposes of s.5(2) of the Domicile and Matrimonial Proceedings Act 1973, so W's unlawful presence in this country in the instant case did not bar her from invoking the jurisdiction of the court under the 1975 Act to apply for reasonable provision out of the deceased's estate.

### 2.3. Immigration status and human rights

#### 2.3.1. *Witkowska v Kaminski*-the issues at trial

In *Witkowska v Kaminski*, Mrs Witkowska (W)'s claim for financial provision out of the intestate estate of the deceased was on the alternative bases that she was eligible as a cohabitant under sub-ss.1(1)(ba) and 1(1A), or a dependant under sub-s.1(1)(e). The deceased died on 6th October 2002 and letters of administration were granted to the defendant (K), his son, who was the person solely entitled on

intestacy. Apart from the question (dealt with in section 5.1 of this bulletin) whether the effect of the law of intestacy was such as to make reasonable provision for her, there was an issue as to the basis (if any) on which she was eligible to make a claim under the 1975 Act and, in particular, whether her claim could succeed having regard to her illegal presence in England during the period of her cohabitation with and/or dependence on the deceased.

### 2.3.2 The issues on appeal

W succeeded at trial but was given permission to appeal on the basis that that the trial judge had recognised that the award he had made was inadequate to meet her needs if she were to continue to live in England, where she had, by the date of the hearing, been living for eight years. He was also attracted by a point (which he called “the underlying EU point”) raised in relation to **Article 12 of the EC Treaty**. K was given permission to cross-appeal in relation to the question whether W was precluded from making a claim under the 1975 Act because her presence in the United Kingdom was illegal.

### 2.3.3. The underlying EU point

**Article 12** provides that:-

“Within the scope of application of this treaty and without prejudice to special provisions therein any discrimination on the grounds of nationality shall be prohibited”

It was submitted for W that by limiting the award to what was sufficient to maintain

her in Poland, the judge was effectively forcing her to return there. Rejecting this submission, Blackburne J said that the award was not conditional on her returning to Poland; she remained free, subject to immigration law, to remain in this country as she had done for most of the time since the deceased’s death. He also accepted the submission on behalf of K that Article 12 operated only within the scope of the treaty and had no application to the substantive law of succession to a deceased’s estate or to the jurisdiction conferred by the 1975 Act to alter the manner in which a will or intestacy would otherwise operate in respect of a deceased person’s estate.

### 2.3.4 The Human Rights issue

Blackburne J held that **Article 14 of the European Convention of Human Rights** had no application. This provides, so far as was relevant, that:-

“...the enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as...national...origin”

and **Article 2 of the Fourth Protocol to the Convention** is to the effect that

“everyone within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”

In relation to this, Blackburne J held that there was no substance to the suggestion that the Article 14 right had been infringed. In any event, Article 14 was not a free-standing guarantee of equal treatment, but related to substantive rights and

freedoms set out elsewhere in the Convention. Further, **Article 2 of the Fourth Protocol** was not one of the Convention rights to which the Human Rights Act 1998 applied, since the Fourth Protocol had never been ratified by the United Kingdom.

### 2.3.5 The claimant's immigration status

This aspect of the case was raised by both parties on the appeal. For W, it was contended that the trial judge had failed to have regard to sub-s.3(5) of the 1975 Act, which requires the court to have regard to the facts at the date of the hearing. It was submitted that he had failed to assess W's reasonable needs by reference to the state of affairs at the date of trial when she was lawfully entitled to live in the United Kingdom, as opposed to the state of affairs at the date of death, when she was an illegal overstayer.

It then emerged (as had not been previously realised) that in all probability W's residence was still unlawful, notwithstanding Poland's accession to the European Union on 1st May 2004. **The effect of the Immigration (European Economic Area) Regulations 2000 (as amended), regs. 5, 14 and 21(3)** and the **Accession (Immigration and Worker Registration) Regulations 2004 (as amended)** was that, for a period of five years from the date of accession, nationals of (*inter alia*) Poland were permitted to reside in the United Kingdom without leave only if the person in question:-

- (a) had sufficient resources to avoid him becoming a burden on the social assistance system of the United Kingdom; and

- (b) was covered by sickness insurance in respect of all risks in the United Kingdom

It was not suggested on behalf of W that she met those requirements.

### 2.3.6. Summary

Both the appeal and the cross-appeal failed. As to W's appeal, Blackburne J did not accept that the decision as to the level of maintenance assumed that W's residence in England continued to be unlawful. On the cross-appeal, he rejected the argument that her unlawful presence in England during the period while she was being maintained by and/or cohabiting with the deceased barred her from making a 1975 Act claim.

### Cases

**Cyganik v Agulian [2005] EWHC 444 (Ch), (reported as Agulian and anor. v Cyganik); revsd., [2006] WTLR 593, CA.**

In Re Fuld (no.3) [1968] P.675, at 684F-685D

**Witkowska v Kaminski [2006] WTLR 1293, [2006] EWHC (Ch) 1940**

**Mark v Mark [2006] 1 AC 98, [2005] WTLR 1223, HL**

## Section 3. Practice and procedure

### 3.1. Introduction

This section is mainly concerned with the case of *Nesheim v Kosa* [2007] which follows the trend established by the cases of *Hannigan v Hannigan* [2000] and *Parnall v Hurst* [2003]. In both of those cases it was held that it would be a disproportionate sanction, and contrary to the overriding objective of enabling the court to deal with cases justly, to deprive the claimant of the opportunity to have a viable 1975 Act claim determined on the merits, although there had been numerous and (in some respects) serious procedural failures by her solicitors.

### 3.2 Failure to effect service in accordance with rules of court

The procedural issue in the 1975 Act case of *Nesheim v Kosa* [2007] was the consequences of failure to serve proceedings out of the jurisdiction within the six month time limit prescribed by CPR r. 7.5(3). Although the case is so entitled, it is clear from the facts and the judgment of Briggs J that Jan Joseph Kosa (K), the widower of the deceased, was the claimant, and Esther Lilian Nesheim (N), the sister of the deceased, and her executor and principal beneficiary, was the defendant.

#### 3.2.1 Facts

Diana Kosa died on 24th October 2003 and probate was granted to N, who lived in Norway, on 7th January 2005. The report of the case does not state the nature

and extent of the net estate, but K's claim was for the transfer to him of his wife's share of the matrimonial home, alternatively, a grant to him of a life interest or other right to reside in it. The claim was intimated to N's English solicitors in correspondence which began on 9th February 2005, and the claim form was issued on 5th July of that year. N's English solicitors informed K's solicitors that they had no instructions to accept service, and on 7th July reminded them of the need to obtain permission to serve out of the jurisdiction. On 14th November, K's solicitors had the claim form resealed for service in Norway and it appears that they considered that permission was not necessary because it was a claim which could be served under the Lugano Convention without permission. On 30th December (six days before the time limit for serving out of the jurisdiction would have expired), a copy of the proceedings and a translation into Norwegian were purportedly served on N in Norway. In the course of the copying, the original date stamp of 5th July 2005 was omitted, so that on its face the claim form was stamped with the date of re-sealing. Since the 4-month limit for service within the jurisdiction had by that date expired, N's English solicitors, when acknowledging service on 18th January 2006 and stated that they intended to dispute jurisdiction on that ground. On 15th February, a copy of the original claim form bearing the 5th July 2005 date stamp was faxed to them and on 17th February they first took the point that the service in Norway was invalid, since permission to serve out had not been obtained, and Inheritance Act claims were outside the scope of the Lugano Convention. On 20th February Master Price granted retrospective permission to serve out ; on 1st March N applied to set that permission aside and on 20th March K made a fresh application, on notice, for retrospective permission.

### 3.2.2. The principles relevant to a grant of retrospective permission so as to remedy defective service

Dealing with those applications *de novo* on the merits, Briggs J identified a tension between two competing principles. The first, enshrined in CPR r.3.10, was that an important purpose of the overriding objective and the CPR was to avoid, as far as possible, long, costly and arid warfare over procedural matters, and to focus on resolving the underlying issues. The second was that rules as to the commencement and service of originating process (set out in CPR rr. 7.5 and 7.6) are there to be obeyed and are likely to be strictly enforced.

The first principle prevailed in *Hannigan v Hannigan*, from which Briggs J quoted paragraphs 36-39, where it is forcefully expressed. He observed that the same approach was adopted in *Parnall v Hurst* and in Master Price's judgment in the instant case. In relation to the second principle, he reviewed a series of cases (referring, in particular, to *Anderton v Clwyd CC* [2002]) whose tenor is that express limits on the court's power to extend time for service after the expiry of the relevant period were not to be evaded by reference to any inherent jurisdiction of the court or by the exercise of the power to remedy errors under CPR r.3.10

In *Anderton v Clwyd CC*, the Court of Appeal identified two types of case in which an application might be made, viz:-

(1) where the claimant has not attempted to serve a claim form in time by any of the permitted methods and applies under CPR r.6.9 for an order retrospectively dispensing with service; and

(2) where an ineffective attempt has been made and the defendant does not dispute that he, or his legal adviser, has received and had his attention drawn to the claim form by a permitted method of service within the appropriate time-limit.

The Court held that the application in the first type of case would be an attempt to circumvent the limitations in CPR r.7.6(3) on granting extensions of time, whereas in the second, the claimant's application is that he should be excused from having to prove service in accordance with the rules, on the basis that there is no point in requiring him to go through the motions of a second attempt to complete in law what he has already achieved in fact. In such circumstances the defendant will not usually suffer prejudice as a result of the court having dispensed with the formalities of service, but the claimant would be prejudiced because he would not be able to obtain an extension of time in which to serve the claim form.

In the instant case, the effect of Master Price's order was to validate the purported service by giving retrospective permission to serve out, and neither the former RSC nor the CPR expressly provide that such retrospective permission either can, or cannot, be granted. However, the decision of the Court of Appeal in the *Ikarian Reefer* case (2000) was clear authority for the proposition that such a power existed under the RSC, and that its judgment, together with that of Rix J at first instance, provided a clear *obiter* indication that the introduction of the CPR caused no difference of analysis. The case therefore shows that service out without permission is not a complete nullity and that a grant of retrospective permission for service out is a method available under CPR r.3.10 for remedying the defect arising from the failure to obtain permission.

### 3.2.3. Extending time under the Inheritance Act

Having summarised the principles laid down in *Re Salmon* (1981), Briggs J considered that they were called into play where the remedy of a defect in service would deprive the defendant of the benefit of the limitation period under the 1975 Act, being plainly relevant to the question of the extent to which a defendant might be prejudiced by remedying the defect. However, he considered that prejudice to be at a very low level, because it was inevitable that an application under s.4 to commence proceedings out of time would be made and, given that there was an early intimation of the claim, sensible requests for information had been made and discussion had taken place, there was a clear indication that the claim had been issued on 5th July 2005 and the estate had not been distributed, the *Re Salmon* criteria would tend to favour that application.

As to the availability of a remedy against K's solicitors, Briggs J observed that the relief sought in the claim was principally the transfer of the matrimonial home to him, or a grant of a life interest or other right to reside in it. A financial remedy would be of little use to an elderly man in poor health who had lived in the matrimonial home for many years and wished to go on doing so. He did not consider, in general terms, the weight to be attached to the existence of a remedy against the claimant's solicitor, but there is valuable guidance on that matter in the case of *Adams and anor v Schofield and anor*, which was decided by the Court of Appeal in 1981 but remained unreported until its appearance in WTLR [2004]. In that case it was held that, having found in favour of the claimant on all the other *Re Salmon* guidelines, the judge at first instance should not have decided against her solely on the ground that she had a remedy against her solicitor.

The principal objection to the grant of retrospective permission was the seriousness of the failure to seek permission to serve out, even where (as in the instant case) it would have been granted if sought. Such relief would be given sparingly and only after very serious consideration of its appropriateness. The situation had been brought about by the errors of K's lawyers in adopting the view that permission was not required and their inactivity in that respect once they had been notified that N's English solicitors would not accept service. He considered that (as in *Hannigan*) the overriding objective was a speedy and economic trial of the issue where there was a bona fide and arguable case, and was therefore directly opposed to a focus on essentially procedural matters. To refuse retrospective permission would be to put the need to discipline lawyers for a genuine mistake ahead of the clear interests of doing justice between the parties. The order made by Master Price was therefore affirmed, the defendant's appeal was dismissed and her application to set aside the order was refused. Permission to appeal was also refused, on the grounds that the jurisdiction to grant retrospective permission and the principles on which it should be exercised were clear, and that, in so far as it was relevant as a contributory factor, any course which would discourage the parties from further procedural litigation and encourage them to concentrate on the substantive issues should be adopted.

This decision, adopting the principles laid down in *Hannigan* and continuing the approach adopted in *Parnall v Hurst*, is also in accordance with the course followed in s.4 cases such as *Stock v Brown* (1994) and *Re W (a minor)* (1995) where the merits were very strong and permission to commence proceedings out of time was given in spite of very long delays.

Two other cases discussed elsewhere in this bulletin involved applications to commence proceedings out of time. The first in time was *Saunders v Garrett* [2004], the other aspects of which are dealt with in section 5.3. In that case, the claim was four and a half months overdue. Although s.4 was a substantive, not a procedural provision, the claimant's illness was a wholly acceptable excuse for the delay, which was not of itself prejudicial to the defendants. The merits were a relevant consideration and, although, in the result, the claim failed, there had been sufficient merit for it to be heard.

The more recent case in which permission to commence proceedings out of time was given is *Garland v Morris* [2007], where probate had been granted on 10th May 2001, but no letter of claim was written until 21st November 2003. Permission to extend time was given on 21st April 2004. The Deputy Master considered that the claim had a reasonable prospect of success on the merits (though, as set out in section 5.2.3, it was dismissed at trial), and there were realisable assets out of which the claim could be satisfied. He also accepted the claimant's explanation for the delay, which was that she was unaware of her right to make a claim until the summer of 2003 when she consulted the Citizens' Advice Bureau after discussing the matter with a friend.

### **3.3. Claimants under the 1975 Act and the right to commence a probate claim.**

CPR r.57.5(1) requires that a claim form in a probate action must contain a statement of the interest of the claimant and of each defendant in the estate. In *O'Brien v Seagrave and Seagrave* [2007], C had lived with the deceased for some 12 years immediately before his death, which occurred on 17th January

2005. D1 was the step-son of the deceased and D2, the mother of D1, was the former wife of the deceased. D1 and D2 produced a will under which the beneficiaries were D1 and his children, and probate was granted to them on 2nd September 2005. On 22nd March 2006 C brought an action for a declaration against the validity of the will and for revocation of the grant of probate on the grounds that the will had been forged by D1 or obtained by undue influence. Were that action to succeed, the estate would have passed on intestacy to the deceased's elderly brother. D1 and D2 applied to strike out the claim because C had not stated, and did not have, an interest in the estate. Master Price, apparently with some reluctance, made an order to that effect, but gave permission to appeal.

HH Judge Mackie QC dealt with the appeal on grounds of principle, there being, in his judgment, no authority to the effect that there were circumstances in which an interest was not needed, nor any way of circumventing the requirement of CPR r.57.5(1). However, he observed that C had a clear and accepted financial interest in the outcome of the dispute and one would therefore, in general, expect her to have the right to bring an action of that kind. There was no authority which held that a 1975 Act claim was not capable of being an "interest" and no definition or formulation of "interest" in a decided case which would exclude such a broad construction. The range of circumstances in which the court would permit a person to seek a declaration as to his rights or the existence of a state of facts had increased over the years. Were the question to be decided in the context of the CPR generally, rather than that of the probate jurisdiction, C would in his view certainly have been recognised as having a sufficient interest to seek a declaration. The facts of the case

were unusual and that of itself made it improbable that a decision favourable to C would “open the floodgates”; and if such cases became more common, the importance of removing a potentially unjust obstacle would be emphasised. Accordingly he held that C’s right to bring a claim under the 1975 Act was a sufficient interest to permit her to proceed as a claimant under CPR r.57.

### **Cases**

#### ***Nesheim v Kosa* [2007] WTLR 149, [2006] EWHC (Ch) 2710**

Hannigan v Hannigan [2000] 2 FCR 650, [2006] WTLR 597, CA

Parnall v Hurst [2003] WTLR 997

Anderton v Clwyd CC [2002] 1 WLR 3174, [2002] 3 All ER 813, CA

National Justice Compania Naviera SA v Prudential Assurance Co Ltd (No 2) (The Ikarian Reefer) [2000] 1 WLR 603

Re Salmon [1981] Ch 167

#### ***Adams and anor v Schofield and anor*, [2004] WTLR 1049, CA (judgment 16th July 1981)**

Stock v Brown [1994] 1 FLR 840

Re W (a minor) [1995] 2 FCR 689

#### ***Garland v Morris and anor* [2007] WTLR 797**

#### ***O’Brien v Seagrave and Seagrave* [2007] EWHC 788 (Ch)**

## **Section 4 - Interpretation**

### **4.1. Inheritance (Provision for Family and Dependents) Act, s.9**

Where the deceased, immediately before his death, was beneficially entitled to a joint tenancy of any property, s.9 enables the court to order, for the purpose of facilitating the making of financial provision for any applicant under the Act, that the deceased’s severable share of that property, **at the value thereof immediately before his death**, shall, to such extent as is just in all the circumstances, be treated as part of his net estate. The meaning of the italicised words has been considered by the Court of Appeal in *Powell v Osbourne* [1993] in relation to a policy of life assurance on joint lives and, more recently, in *Dingmar v Dingmar* [2006], an application by a surviving spouse, where the property in question was the matrimonial home.

#### **4.1.1. The facts of *Dingmar v Dingmar***

The deceased (H) bought a house in joint names with his first wife (W1). There were two children of the marriage, one of whom, a son (S) was the defendant to the claim. After W1’s death, H put the house into the joint names of himself and S by way of gift, and shortly afterwards married W2. When the house passed by survivorship to S on H’s deceased’s death in 1997, W2 continued to live there with the children of the first marriage, who were at that time 13 and 11.. H had died intestate but his estate contained no assets of any value, so no grant of administration was made at the time.

In 2004 S claimed possession of the house. As a necessary preliminary to her claim under the 1975 Act, W2 obtained letters of administration. Since the estate contained no other assets, she applied under s.9 for an order that H's severable share of the house be treated as an asset of his net estate. It was agreed that the value of the house was £40,000 at the date of H's death and £95,000 at the date of the hearing. The judge at trial found that reasonable financial provision had not been made for W2, and that reasonable provision would be a half share of the house. However, he held that under s.9 the provision which could be made for her was limited to the value of the severable share at H's death. In effect, he awarded her an equitable charge over the property for £20,000.

#### 4.1.2 The issues

That decision gave rise to two questions on W2's appeal, viz:-

- (1) could the award have been in the form of a beneficial interest rather than a lump sum; and
- (2) whichever type of award was made, was the quantum limited by the value of the property at H's death ?

It may be, as Lloyd LJ surmised, that Parliament had never considered the type of situation that arose in *Dingmar*. An order under s.9 can be made only if a claim under s.2 is commenced within the period of six months from the date when representation is first taken out. Thus, provided a grant is applied for reasonably soon after death, a significant increase in value of the severable share between the date of death and the date of hearing is unlikely. In this case, a grant was not required for the administration of H's estate the value of which

was negligible, but as a preliminary to W2's 1975 Act claim, which was itself prompted by S's commencement of possession proceedings, seven years after H's death.

Lloyd LJ (with whom the other members of the court agreed on this point) held that an order giving W2 a beneficial interest in the house could have been made under s.2(1)(c), which gives the court power to order a transfer of such property comprised in the estate as is specified; however, in his dissenting judgment, he held that the award was limited by the words "at the value thereof immediately before his death", and therefore the share to be transferred could not exceed 21%. That figure is the percentage of the value of the house at the date of the hearing (£90,000) represented by the value of the half share at death (£20,000).

It seems that, like the trial judge, he reached this conclusion with some regret, but in his judgment, to hold otherwise would have involved treating those words as having no effect. However, for somewhat differing reasons, Jacob and Ward LJ felt able to decide that the words did not prevent the court from awarding W2 a half-share of the property, not limited by its value at the date of death, and the trial judge's order was varied to the effect that S should hold the property upon trust for himself and W2 as tenants in common in equal shares.

#### 4.2. The Forfeiture Act 1982, s.3

*Land v Land's Estate* [2006] is the first reported case in which the court has had to consider the effect of s.3 of the Forfeiture Act 1982. The effect of sub-s.3(1)

and 3(2)(a) is that the forfeiture rule shall not be taken to preclude any person from making an application, or the making of any order, under the 1975 Act.

#### 4.2.1. Facts

The claimant, DL, was the executor and sole beneficiary under the will, dated 2nd April 1996, of his mother, ML. DL had lived at home all his life and had a series of labouring jobs, the last of which he gave up in 2002 at ML's request so that he could look after her. He did this as best he could, but after ML suffered a fall in September 2003 and refused either to go to hospital or to permit a doctor to see her, he gradually became less able to cope. However, but did not seek any professional help until 4th January 2004, when she lost consciousness and he called an ambulance. She died two days later and DL was charged with manslaughter, to which he pleaded guilty on 27th April 2004. On 21st May 2004 he was sentenced to four years' imprisonment. On 2nd August 2004 he made a claim under s.2 of the Forfeiture Act 1982 ("the 1982 Act"), which was four days out of time. His legal representatives then successfully applied to amend the claim, seeking a declaration that the forfeiture rule did not apply, alternatively an order under s.2 of the 1975 Act for reasonable provision out of ML's estate.

#### 4.2.2. The forfeiture rule at common law

There is a long-standing rule of public policy, first considered in detail in *Cleaver v Mutual Reserve Fund Life Association* [1892] that one (K) who unlawfully kills another (V) is not entitled to any property which he would have acquired as a result of V's death. Notwithstanding indications by the courts, both before and

after the coming into force of the 1982 Act that not all cases of manslaughter involve the consequence that K forfeits all rights of inheritance from V, it must now be accepted that the decision of the Court of Appeal in *Dunbar v Plant* [1998], followed in *Dalton v Latham* [2003] has settled the question once and for all.

In *Dunbar v Plant*, K was the survivor of a suicide pact. Phillips LJ (as he then was) analysed the law relating to manslaughter cases and concluded that there was no discernible logical basis for not applying the forfeiture rule to all cases of manslaughter; it applied whenever anyone had caused the death of another by criminal conduct. While the harshness of applying it inflexibly to all cases of manslaughter in all circumstances was such that the rule probably could not survive unvaried, there was no need for judicial modification of the rule. The powers given to the court by the 1982 Act enabled the appropriate course to be taken when the application of the rule appeared to conflict with the ends of justice. In *Land v Land's Estate*, HH Judge Norris QC held that that reasoning was part of the ratio of the majority (Phillips and Hirst L.JJ) and thus considered himself unable to declare that the forfeiture rule did not apply to the type of manslaughter to which the claimant had pleaded guilty.

#### 4.2.3. The Forfeiture Act 1982

Concerns expressed about the inflexibility of the rule of public policy and the harshness with which it operated where the unlawful killing involved a low degree of moral culpability, provided the impetus for legislative intervention. The 1982 Act defines the forfeiture rule as the rule of public policy which in certain

circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.

The court has power under sub-s.2(1) to make an order modifying the effect of the rule, but sub-s.2(2) provides that the court shall not make such an order unless it is satisfied that, having regard to the conduct of the offender and the deceased, and to such other circumstances as appear to be material, the justice of the case requires the effect of the rule to be so modified in that case. Further, sub-s.2(3) provides that no such order shall be made unless proceedings are brought before the expiry of the period of three months beginning with the conviction. Unlike the six-month period prescribed by s.4 of the 1975 Act, there is no jurisdiction to extend time; and, as DL's application under this provision was four days late, he would take no benefit from his mother's estate unless he could make a claim under the 1975 Act. The question which arose was whether, in view of the fact that he had stood to inherit his mother's entire estate under her will, such a claim could possibly succeed.

Dicta of the Court of Appeal in **Re Royce** [1985] supported the view that it could not. In that case, Mrs Royce was convicted on 27th July 1979 of the manslaughter of her husband, with a finding of diminished responsibility. Under her husband's will she stood to receive his entire estate, but the effect of the common-law rule was that she forfeited those benefits. The fact that the sentence imposed (a hospital order under the Mental Health Act 1959) was remedial, indicating little, if any, moral culpability, did not affect the application of the rule. In April 1982 she made an application under the 1975 Act for provision out of her husband's estate, and in June 1983 it was struck out as disclosing no reasonable cause of action. The

Court of Appeal, affirming the decision at first instance, did not decide whether s.3 of the Forfeiture Act would have availed Mrs Royce, but both Ackner and Slade L.JJ expressed the view that it was her conduct and the rule of public policy, and not the consequence of the will or of the law relating to intestacy, which had had the effect of leaving her without financial provision.

#### 4.2.4. The current approach to statutory interpretation

The judge in the instant case concluded that he was not bound by any direct decision, but was bound to approach the meaning of s.3 in the light of current rules of construction. The court was required by s.3 of the Human Rights Act 1998 to read and give effect to primary legislation in a way compatible with Convention rights. Article 8 of the First Protocol to the ECHR provided that no-one should be deprived of his possessions except in the public interest and subject to the conditions provided for by the law. The right to inherit property under a will was a "possession" for that purpose, but following the decision in *Dunbar* the claimant would be deprived of it whether or not it was in the public interest, unless either relief under s.2 of the 1982 Act was available, or, if not, s.3 was read as meaning that the forfeiture rule did not preclude the making of an order under the 1975 Act. That provision was to be read, so far as permissible, in a manner which enabled the court to deprive the wrongdoer of benefit when it was in the public interest to do so, but, in its discretion, to mitigate the harshness of the forfeiture rule when it was not.

He then considered the policy underlying s.3. Was it to afford relief only to unlawful killers (K) for whom reasonable provision was not made under V's will

or intestacy, or to the presumably much larger class of those for whom V had made provision or would take under his intestacy? The latter seemed the far more likely policy, and s.3 should be read so as to give the fullest effect to its words and as not precluding the making of an order in favour of K under the 1975 Act, notwithstanding that it was the forfeiture rule and not the terms of V's will or the devolution of his estate on intestacy which meant that no provision was made for the claimant.

He then found, on the facts, that the public interest would not be served by depriving the claimant of all benefit. For an adult son, the standard of provision was what was reasonable, in all the circumstances, for his maintenance. The deceased's house was ordered to be transferred to the claimant outright and he was also awarded a legacy of £1,000 to meet his immediate financial needs. The balance of the cash in the estate would pass to those entitled on intestacy.

### **Cases**

Powell v Osbourne [1993] 1 FLR 1001, CA

**Dingmar v Dingmar [2006] WTLR 1171, CA**

**Land v Land's Estate [2006] WTLR 1447**

Dunbar v Plant [1998] Ch 412, CA

Dalton v Latham [2003] EWHC 796 (Ch); also reported as Re Murphy, Dalton v Latham [2003] WTLR 687

## **Section 5 - Awards to individuals**

### **5.1. Surviving spouses**

The decision of the House of Lords in the matrimonial case of **White v White** [2001] continues to influence the way in which courts have dealt with claims by surviving spouses under the 1975 Act. Because sub-s.3(2) of the 1975 Act (referred to here as the "notional divorce" provision) directs the court to have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died, the marriage, instead of being terminated by death, had been terminated by a decree of divorce, the matrimonial case-law is to some extent relevant. The judgments in the two cases reviewed give valuable guidance on the way in which the courts should treat the "notional divorce" exercise and on the application of **White v White** to 1975 Act claims by surviving spouses.

#### **5.1.1. Fielden v Cunliffe**

##### **5.1.1.1 Facts**

The claimant was the widow of the deceased. He had engaged her as a housekeeper in April 2001, and on 25th October 2001 he made a will, expressed to be in contemplation of his marriage to her, by which left his residuary estate (some £1.4M) upon discretionary trusts for a class of beneficiaries of which she was a member, and which included the widow, children and remoter issue of his deceased brother. There was also £226,000 in accounts in joint names, which

passed to her by survivorship. He died on 11th November 2002, aged 66; she was then 49. Probate was granted on 11th June 2003 and, shortly before the hearing, the executors made an open offer to settle the sum of £200,000 on the claimant under the terms of the will trust. That offer was rejected and, on 15th February 2005, HH Judge Howarth awarded her £800,000.

#### 5.1.1.2. Judgment

The executors appealed. In order to save the costs of a re-trial, it was agreed that the Court of Appeal should provide a figure in substitution for that arrived at by the judge. The appeal was allowed (the award being reduced to £600,000), primarily on the ground that, although the judge had referred to all the statutory criteria, he had not explained how he had arrived at the figure of £800,000. That alone was sufficient to vitiate his conclusion, and, of the other seven issues raised on the appeal, the Court of Appeal considered only the application of *White v White* and the short duration of the marriage.

The figure of £600,000 was arrived at on the basis that reasonable provision for alternative accommodation would be £200,000, and for income, a lump sum which would produce a net annual income of £30,000. The then current Duxbury tables gave £560,000 as the appropriate lump sum and, deducting Mrs Cunliffe's own capital resources (estimated at £150,000), that gave a lump sum of £410,000, which was rounded down to £400,000. To the extent that, on a *White v White* cross-check, this represented a departure from equality, it was justified by the brevity of the marriage and the limited nature of her contribution to the marriage; see points (2) and (6) below.

The following points, of more general applicability, emerge from the leading judgment by Wall LJ.

- (1) Although the marriage was short, Mrs Cunliffe had entered into it on the basis that her obligations to her husband were of indefinite duration and could take all manner of forms. For instance, as he was considerably older than her, she might have expected to spend several years nursing an invalid. She was entitled to have a reasonable expectation that her life as once again a single woman need not revert to what it was before her marriage; see *Miller v Miller* [2005]
- (2) In assessing what was reasonable provision, the most important factors were her housing and income needs. The brevity of the marriage and the limited nature of her contribution to it were relevant in those respects. While the estate was adequate to make reasonable financial provision for her, it should not be of a level and nature to allow her to live in the former matrimonial home or at the standard of living which she had enjoyed during the marriage.
- (3) In *Re Besterman* [1984] Oliver LJ had said that, where a lump sum order was made, the court must take rather greater account of contingencies and inflation, and that reasonable provision for the applicant widow should be, in addition to the secure roof over her head, a sum which would provide an adequate income and a cushion in the form of available capital which would enable her to meet all reasonably foreseeable emergencies. Wall LJ observed that such a "cushion" was no longer

considered a proper approach to financial proceedings following divorce. It was no longer the case (as it had been when *Besterman* was decided) that the court was required to exercise its powers so as to put the parties in the financial positions in which they would have been if the marriage had not irretrievably broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

- (4) On the other hand, *Besterman* remained authority for the proposition that the blameless widow of a wealthy man is entitled to look forward to financial security throughout her remaining lifetime and that reasonable financial provision, which was not limited to maintenance, must be viewed accordingly.
- (5) There was no one correct figure, but the figure of £600,000 arrived at was within the “bracket” of what might be awarded in the exercise of a judicial discretion. Although there might be criticism of an approach which was seen as concentrating on the claimant’s “needs”, they were, in practical terms, the most important factor in the statutory framework.
- (6) There was no presumption of equality of division of assets and the judge had been wrong to start from that position. In *White v White*, the House of Lords had held that the statutory provisions applicable to financial provision on divorce had to be applied to the facts of the individual case on a fair and non-discriminatory manner. Having done that, the court should consider whether and to what extent there should be a departure from equality. There was no reason not to adopt this approach (with appropriate adjustments) in 1975 Act proceedings, not least because

s.3(2) imposes a statutory cross-check in relation to the provision which the claimant would have received on the notional divorce. However, caution was necessary since a deceased husband was entitled to bequeath his estate to whom he pleased, subject to his obligation to make reasonable provision for his widow. In such a case the cost of provision might bear little relation to the value of the estate.

### 5.1.2. **P v G, P and P** (also reported as **P v E and others**)

#### 5.1.2.1. Facts

The claimant and the deceased (Mr P) first met in 1973, when she came to act as housekeeper for him and his two infant children by his earlier marriage (S1 and D1). At that time he was in employment and owned a substantial property (Blackacre) in which there was little equity, as he was heavily in debt. She had no assets. They fairly soon commenced living together, but did not marry until shortly before the birth of their daughter (D2) in 1985. By that time, Mr P had established two successful businesses which were incorporated, and in which Mrs P worked and had a small shareholding. In about 1996 she suspected that he was having an affair with an employee and ceased to work in the business, and in 1998, after a confrontation, divorce was contemplated, but the parties continued to live at Blackacre. In July 2000, Mr P retired and began drawing his pension from the company pension fund. In October 2001, Mrs P left Blackacre, but they were both unhappy and she moved back in May of the following year. Following a fall while on holiday in Spain which resulted in injury requiring an operation, Mr P died unexpectedly on 14th August 2002.

Mr P had property in Spain (disposed of by his Spanish will made on 25th July 2001 which was in favour of the children) as well as in England. By his English will made on 4th December 1998 he left his residuary estate on discretionary trusts, the beneficiaries being Mrs P, D1, S1 and D2. Blackacre was left on trust for Mrs P during her life or until remarriage, and thereafter on the trusts of the residue. The trustees, who were a solicitor (E), S1 and D1, were requested to have regard to any memorandum of wishes, and such a memorandum was signed on 24th June 1999. Probate of his English will was granted on 27th February 2003. On 7th July 2003, the trustees of the company pension fund resolved to pay pensions of £143,057 per year, backdated to 7th October 2002, to each of P and D2, and to divide the lump sum benefit of £710,220 equally between the three children in accordance with Mr P's nomination.

Mrs P's 1975 Act claim was commenced on 9th August 2003. She sought to retain her pension entitlement (capitalised at £3,825,000) and to have transferred to her further property worth £3.25M consisting partly of a cash lump sum and partly of non-pension assets. The defendants offered Blackacre (£900,000) and a lump sum of £100,000. At trial it was found that the "notional divorce" exercise would, on the facts, have resulted in an equal division of assets. On the claimant's case, the net estate was approximately £5M; on the defendants' case it was just under £4.48M. In the result, the claimant was awarded £2m, to include Blackacre.

#### 5.1.2.2. Judgment

The following points of general importance appear from the judgment of Black J:-

- (1) In presenting 1975 Act claims to the court, it was inappropriate to replicate the entire fictional ancillary relief process; the court's task was simply to reach a sufficient conclusion as to the outcome of the "notional divorce" and to give due weight to that conclusion, along with the other relevant factors.
- (2) The "notional divorce" exercise required by sub-s.3(2) was simply one of the matters to which the court must have regard (*Re Besterman* [1984] followed) ; there is no presumption of equality nor that equal division should be a starting-point.
- (3) It was probable that the difference between the termination of the marriage by death and its dissolution by divorce might often result in greater provision being ordered under the 1975 Act than would have been the case on the "notional divorce" (*Re Krubert* [1997] followed).
- (4) It is not necessarily the case, in 1975 Act proceedings, that the defendant beneficiaries' costs would be paid out of the estate, particularly where one of the beneficiaries whose interests would or might be adversely affected by the claim (in this case, D2) had not been a defendant and had not had a say in the way in which the defence had been run.

#### 5.2. Adult children

Some ten years ago, there was a series of cases which did much to extend and clarify the law relating to claims by adult children. The decisions of the Court of Appeal in *Re Hancock* [1998], *Re Pearce* [1998] and *Espinosa v Bourke* [1999]

have been particularly influential, and were cited in all three of the cases now reviewed.

### 5.2.1. *Re Gold, Gold v Curtis*

#### 5.2.1.1. Facts

Queenie Gold died on 25th August 2002, aged 80, survived by her daughter Rosalyn, who was 60 at the date of the hearing, and her son, Malcolm, who was 58. There were no children of Rosalyn's marriage, which was terminated by divorce in 1984. Malcolm was married and there were two daughters of the marriage, Julia, born in 1973 and Adele in 1974. He and his wife Maureen moved to Canada in 1968 after Malcolm had become professionally qualified; they returned in 1972 and when they moved house in 1975, Queenie and her husband gave him £1,200 for furniture. Some years later they lent him £600 which was not repaid. The relationship between Malcolm and his parents broke down in the 1980s and was not resumed. His personal circumstances deteriorated; in 1994 Adele was diagnosed as suffering from a psychiatric disorder and in 1996 Malcolm himself suffered a nervous breakdown and attempted suicide. A business venture in which he was involved at the time had failed.

In her home-made will dated 14th June 1998, Queenie left her entire residuary estate to Rosalyn and stated "I do not want to leave my son Malcolm or his family to benefit from anything of mine as he has had enough from his parents during his lifetime and also he has been very estranged during the last few years". In March 2002 Queenie had a stroke and Malcolm and his family visited her;

contact was maintained until her death in August. Shortly after Queenie's death, Rosalyn wrote to Malcolm, enclosing a copy of the will and stating that she would like to mitigate its effect, but she did not actually do anything. Probate of the will was granted to Rosalyn on 26th March 2003, the net estate being approximately £870,000.

Whereas Rosalyn had assets of her own worth £1.1M, derived from her divorce settlement, and no dependants, Malcolm had no assets of significant value other than his house, in which there was equity of about £340,000. His gross annual income was £12,600; Maureen's, which was £32,000 would cease earlier, as they were due to retire in 2010 and 2006, respectively. Their combined gross retirement income would be about £18,000 per year. Further, because of her mental condition, Adele was dependent on him and was likely to remain so.

#### 5.2.1.2 Judgment

Against that factual background and the evidence which showed Queenie to have been a difficult and combative person who found herself at odds with all manner of people, including Malcolm, who shared some of her characteristics, it was not unreasonable of him to have distanced himself from her, Master Bowman found that the absence of any provision for Malcolm in Queenie's will was not reasonable. He was awarded £250,000 made up of £220,000 as a fund to supplement his income and £30,000 for replacement of capital items. Master Bowman commented that although this left Malcolm far less well off than Rosalyn, the basis of the jurisdiction was the relief of financial need and not the achievement of equality (or fairness) between the parties.

## 5.2.2. *Re Myers, Myers v Myers and anor*

### 5.2.2.1. Facts

The deceased died on 28th July 2002 aged 89, leaving net estate £8,356,400. He had been married twice, the claimant (BM) being one of the children of his first marriage, which had broken down in the early 1950s. He remarried shortly afterwards and was survived by the widow and three children of that marriage. He left his estate to them and their descendants, making no provision for his first wife or his children of that marriage. In 1976 he settled 3,500 shares in Unilever upon trusts for BM under which she was entitled only to the dividend income, but in 1989 the shares, which had by then been split five for one and had a value of £93,800 were released to her. Both before and after the settlement on BM, the deceased wrote a number of memoranda expressing a very low opinion of her, in particular that she was hysterical, she had not taken proper advantage of the education which he had provided for her, and preferred to sponge off others than earn her own living.

By the date of the hearing, at which BM was aged 60, she had sold over half of the shares, and the value of the 27,162 which she had retained was £142,600; had she kept the whole portfolio she would (as a result of further splits and consolidations) have had 62,500 with a value of £328,125. She owned no property, she lived mainly in a small rented flat in Paris, and stayed with her mother when she was in England. Her only income other than the dividends from the shares was the State pension of £71 per week.

### 5.2.2.2 Judgment

Balancing the factors for and against the claimant, Munby J concluded that the will did not make reasonable provision for her. Against her were the financial provision made for her during the deceased's lifetime and the fact that, as he put it "many of her wounds were self-inflicted"; she had not made the best use of her education and, having obtained a job as an established civil servant, threw it up in 1976. In her favour were her severely straitened circumstances, the fact that her situation was due to mental fragility and awkward personality rather than indolence, that she had not behaved as badly to the deceased as he seemed to have thought, and that he had very substantial wealth. Thus, the claimant was entitled to reasonable maintenance, which was not just enough to get by on, but neither did it include anything reasonably desirable for her general benefit or welfare. Provision would be made by way of a settlement on her of a sum sufficient to buy a flat (£275,000), remainder to the deceased, with power for the trustees to apply capital for her maintenance, and a lump sum payment of £241,500 made up of £20,000 to equip her new home, £21,250 representing living costs since the deceased's death, and £200,000 which, together with the capital value of her shares, would provide a fund sufficient to meet a net income requirement of £20,000 per year.

## 5.2.3. *Garland v Morris and anor*

### 5.2.3.1. Facts

Mr Garland died on 25th February 2001 survived by the two daughters of his first marriage, the claimant (Yvette) and the second defendant (Beverley). The

claimant was unmarried and had three children aged 21, 9 and 3; the second defendant was married and had two children aged 23 and 19. By his will dated 5th September 1995 and a codicil dated 17th June 1999 he left pecuniary legacies of £5,000 to each of his daughters' children who were alive at his death; there were some other small legacies, and the personal chattels and the residue of the estate (amounting to £284,361) were left to the second defendant.

The financial position of the claimant, who received nothing under the will and codicil, was that she had her own house, which she had bought with money inherited from her mother, but it was in a bad state of repair, as a result of which she became eligible for a renovation grant under the Housing Grants, Construction and Regeneration Act 1996. The work was estimated to cost in the region of £30,000. She was told that she would be liable to repay any amount in excess of £20,000 and that the local authority would take a charge to secure that repayment; she did not want to do this and eventually agreed to take a grant of £20,000 to cover a limited amount of work, which turned out to be inadequate to make the house watertight.. She had no savings, had spent both the legacy given to her second child and £6,000 given to her by her sister, and had debts of approximately £5,000.

Her income of £204.56 per week included £40 from her eldest son who was living at home, the remainder being income support and child benefit payments. She received no maintenance from the children's father and the CSA agreed with her that, owing to his history of violence, the personal risk to her involved in pursuing him for it was unacceptable. She estimated that when her youngest child

was old enough, she might be some £30-40 per week better off if she could get 16 hours' work per week.

However, her claim at trial was advanced on the basis that she needed two lump sums, one of £19,000 + VAT for renovations to the house, the other of £15,000 + VAT to convert the loft into a third bedroom, which was required since her son was still living at home. As to this it may be observed that it would not fall within the description of "maintenance" in *Re Dennis* [1981], that is, it was not a claim for sums which would discharge her daily living expenses at a rate appropriate to her; nor would such payments free up any income that could be used for that purpose.

#### 5.2.3.2 Judgment

Although the claimant was in financial need and lived in sub-standard housing, it was found that she had failed to establish that the will did not make reasonable provision for her. The main factors in that decision were:-

- (1) She had inherited all her mother's estate, which had enabled her to buy her own house; its poor condition was very largely her own fault
- (2) She also bore some responsibility for her financial difficulties in that she had had three children by a man who, she must have realised, was never going to contribute to her maintenance.
- (3) She had been estranged from her father for many years and he owed her no obligation, whereas her sister had had a close relationship with him

and he had assumed responsibility to assist in the maintenance of her and her family, encouraged her children to undertake university education and said that he would pay for it.

- (4) There were concerns about the sister's state of health and that of her husband, and as to whether they would be able to support themselves adequately in their retirement even with the benefit of the deceased's estate

### 5.3. Cohabitants

The case discussed below is the first reported case involving same-sex cohabitants and is interesting in that the application was entertained on human rights grounds although, as the Civil Partnership Act 2004 had not come into force at the time of the hearing or when judgment was delivered, the 1975 Act did not make any express provision under which a same-sex cohabitant was eligible to claim financial provision from the estate of his or her deceased partner. The issue as to the claim being commenced some four and a half months after the expiry of the s.4 time-limit has been discussed in section 3.2.3, above

#### 5.3.1. *Saunders v Garrett*

##### 5.3.1.1. Facts

Mr Saunders, the claimant (S) and Mr Garrett, the deceased (G) lived together as same-sex cohabitants from about 1989 until G's death on 3rd March 2002, aged

64. Between 1989 and 1997, S was substantially supported by G. In 1997/98, S had some income from employment, and from 1998 onwards, both S and G received State benefits. S's evidence was that they were both ill from then on, and looked after each other. G also had an income from nine flats which he owned, out of which he paid the food bills and the utility and general bills of the property which they occupied together. They lived together at various properties in South Wales, the last of which was 1022 Carmarthen Road, Swansea, purchased jointly in 1999 with the aid of a mortgage and held by them as beneficial tenants in common.

By his will made on 9th October 2001, G left to S his personal chattels, his half share in 1022 Carmarthen Road, free of his share of the mortgage, a one-sixth interest in the flats, also free of the mortgage, and one-sixth of residue. The remainder of the estate was divided equally between G's mother and four siblings. The effect of these dispositions was that in addition to the Carmarthen Road property, S received £26,500 which enabled him to pay off his share of the mortgage, with a modest cash balance left over. However, his expenditure exceeded his income by some £2,000 per year and there was no reasonable likelihood that he would be able to return to work.

S's claim had two aspects; one was for a sum of money to enable him to rectify the defects in his home; the other for a sum of money to assist in funding his income shortfall and to provide for future contingencies.

### 5.3.1.2 The human rights issues

These issues will no longer arise in claims by same-sex cohabitants, because, as explained in section 1.3, above, CPA 2004 has amended the 1975 Act by the insertion of a new sub-s.1(1B). This mirrors the existing sub-s.1(1A) by applying sub-s.1(1)(ba) to persons who had lived for the whole of the period of two years immediately before the death of the deceased in the same household as, and as the civil partner, of the deceased. However, it is worth noting the Court's conclusions as to the human rights issues raised, as follows:-

- (1) Sub-ss.1(1)(ba) and 1(1A) of the 1975 Act as then in force did discriminate against S on the ground of his sexual orientation and in a way which was not justified on the basis of some legitimate aim. Article 14 of the European Convention on Human Rights therefore came into play such that his engaged rights should be secured to him without discrimination. The Court should therefore exercise its powers under s.3 of the Human Rights Act 1988 to "read up" those provisions of the 1975 Act so as to render them Convention-compliant.
- (2) Article 8 of the First Protocol, which provides that "Every person has the right to respect for his private and family life, his home and his correspondence" was not engaged by the claim for capital to effect the rectification of defects in his home, but was engaged in the claim for a fund to meet his income shortfall and to provide a fund for contingencies. In effect that was a claim to protect his current occupancy of his home and fell within the ambit of his right to respect for his home.

- (3) Rights of inheritance and succession as between those in a family relationship (including a single-sex relationship) were an aspect of family life, and the right to make a 1975 Act claim was within the ambit of inheritance and succession rights and, therefore, of his Article 8 right to respect for his family life.
- (4) Article 1, which is concerned with entitlement to peaceful enjoyment of possessions, was not engaged. Neither the right to make a 1975 Act claim, nor a legitimate expectation of such a right, fell within the concept of "possessions" in Article 1.

### 5.3.1.3 The basis of the 1975 Act claim

S had claimed in the alternative under sub-s.1(1)(ba) as a cohabitant and under sub-s.1(1)(e) as a dependant. It was found as a fact that S had been maintained by G during the two years immediately before G's death, but as, on the grounds discussed above, it had been held that he qualified under sub-s.1(1)(ba), he could not also make a claim under sub-s.1(1)(e); that provision excludes anyone who falls within any of the other classes defined by sub-s.1(1). However, it was appropriate to consider whether, if S could not bring himself within sub-s.1(1)(ba), he could bring himself within sub-s.1(1)(e). From at least 1998, there was a settled arrangement under which S was at least partly maintained by G. The care given by S to G was not "full valuable consideration"; the evidence was that each had looked after the other.

#### 5.3.1.4. Judgment

S's wish to remain in his present home and to remedy its defects was thoroughly understandable, his present income did not cover his expenditure, and he had no prospect of returning to work. The net estate was sufficient for further provision to be made for S. Three of the five defendants were in some, though not severe, financial difficulty; there was no evidence about the other two. It was not contended that G owed any obligation to them; but (contrary to the arguments on their behalf) it was held that G did owe an obligation to S with whom he had cohabited in a marriage-like way for many years, that relationship being characterised by S's long-standing financial dependency on G. This was relevant to consideration of sub-ss.3(2A) and 3(4).

Notwithstanding the existence of those obligations and the availability of assets to satisfy S's claim, it was dismissed. In particular:-

- (1) The fact that the provision made by the deceased was insufficient to enable him to maintain his previous standard of living does not of itself mean that the provision made was not reasonable.
- (2) "Maintenance" connotes the costs or expenditures of daily living though those, and also housing costs, might be funded out of a lump sum payment or met by the provision of a home; *Re Dennis* [1981] and *Re Jennings* [1994] applied.. Neither the failure to make provision for the repair of defects nor of a fund "for a rainy day" (as the judgment puts it) fell within that concept of maintenance.
- (3) S's income shortfall could be made good either by selling the Carmarthen

Road property, which was a five-bedroom house, and buying something smaller, which would leave a cash balance and also result in reduced outgoings, or by letting part of that property to provide an income which would cover the shortfall.

The provision made by G's will had been such as was reasonable, in all the circumstances, for S's maintenance.

#### *Cases*

***P v G, P and P (Family Provision :Relevance of Divorce Provision) [2006] 1 FLR 431; also reported as P v E and ors., [2007] WTLR 691***

***Fielden v Cunliffe [2006] WTLR 29, [2006] 1 FLR 745, CA***

***Miller v Miller [2005] 2 FCR 713, at 725***

Re Besterman [1984] Ch 458, CA

Re Krubert [1997] Ch 97, CA

Re Hancock [1998] 2 FLR 346, CA

Re Pearce [1998] 2 FLR 705, CA

Espinosa v Bourke [1999] 1 FLR 747, CA

***Gold v Curtis [2005] WTLR 673***

***Re Myers [2005] WTLR 851***

**Garland v Morris and anor [2007] WTLR 797**

**Saunders v Garrett [2005] WTLR 749**

Re Jennings [1994] Ch 286, CA

**Sidney Ross**

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**Sidney Ross** is 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.



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