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Succession and Trusts Bulletin, Spring 2010

Family Provision

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Introduction

In contrast to the period covered by the previous bulletin, dated Summer 2007, the period now reviewed has been one of legislative inactivity. However, there have been some notable additions to the case-law, for which, as before, the most prolific sources continue to be the Wills and Trusts Law Reports (published by Legalease) and the Family Law Reports (published by Jordans). Again in contrast with the previous period, the case-law is almost entirely concerned with substantive claims, among which claims by cohabitants (sometimes accompanied by alternative claims as dependants) have been particularly prominent. The other classes represented are surviving spouses and adult children. As before, the structure of the bulletin reflects those areas of activity. 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.

Note:-The material in this bulletin draws substantially on articles which appeared in nos.80 October 2008), 90 (October 2009) and 91 (November 2009) of the Family Law Journal, published by Legalease.

1. Surviving spouses

1.1 Aston v Aston

This is an unusual case because it is one of the relatively few in which a claim by a surviving spouse has failed. It is also unusual because cases heard in County Courts are rarely reported. However, the observations of the trial judge, HH Judge Reid QC, on the question of costs merit the attention of anyone handling a claim which the client is contesting in both a personal and a representative capacity.

Facts

The deceased (G), whose final illness had manifested itself in 2002, died in a hospice on 7th November 2004 having duly executed his last will dated 26th November 2003. By that will he appointed his brother (J) as his sole executor and beneficiary. The value of the net estate (of which the principal asset was G's half share in the matrimonial home) was approximately £188,000. The other half share was owned by the deceased's wife (T), who also received a lump sum of £81,186 as the survivor under a joint life policy. The question arose whether those monies were impressed with a trust to apply them in paying off the mortgage on the matrimonial home.

At the time of G's death, T's salary was £18,800 per year plus quarterly bonuses, and she was entitled to an index-linked civil service pension (£414 per month at the date of hearing) as G's widow. The provision sought by T was G's half share in the matrimonial home together with half the cash in the estate.

G was born in 1955 and T in 1961. They married in 1985 and the marriage had a troubled

history. G had an affair at an early stage; the parties had a son in 1992 who died in January 2002. G had instructed solicitors to issue divorce proceedings in August 2001 but did not pursue them. His final illness became apparent shortly after the death of their son. During that illness T formed an association with another man (M) and left the matrimonial home. She did not return until G had gone into the hospice in which he died.

The notional divorce

The judgment recognises that the provision which the claimant would have received on the notional divorce was just one of the factors to which the court must have regard. In evaluating the provision to be made, the financial needs of the parties to the marriage should be considered, but should not limit the power of the court to divide the assets fairly when they exceed those needs. That highlighted the artificiality of the notional divorce test, since the deceased no longer had any needs; however, in the absence of other dependants who do, the claimant might well expect more generous provision than on divorce.

In October 2002 T and M petitioned for a faculty for a joint grave space in Frimley churchyard. That was apparently not proceeded with, but the judge expressed the view that it was entirely inconsistent with the marriage having any life in it. G spent several periods in hospital and there was clear evidence that at the end of October 2003 he regarded the marriage as dead. Less than a month afterwards, he executed his last will in J's favour. The subsequent history of the marriage gave no support to T's expressed belief that it was still alive and might yet be patched up. G's failure to pursue the divorce proceedings was the result of his illness and not of any hope that the marriage might survive. In those circumstances the divorce fiction must play a large part in determining whether the will made reasonable provision for the claimant.

T's financial position

J sought to reserve the right to raise the issue about the insurance policy monies in separate proceedings, but that was dealt with robustly as follows:-

> "In my judgment that is an issue which falls squarely to be decided in these proceedings. Whether that substantial sum is a part of the claimant's free property is plainly relevant to these proceedings. It would in my view be an abuse of process to try and litigate the point in other proceedings".

The commentary at paragraph 3.4.3 of the White Book states that the categories of abuse of process include litigating an issue which has been decided in a previous case. On the facts of *Aston*, that issue had to be decided in order to ascertain the extent of the net estate, which in turn was a necessary preliminary to the exercise of the discretion under the 1975 Act. To that extent the learned judge was clearly right; subject to obtaining the permission of the court in accordance with CPR r.8.7, the issue could have been raised by way of a counterclaim in the 1975 Act proceedings.

Having considered the relevant authorities, he decided that T was not obliged to use the insurance monies to reduce the mortgage, so her claim under the 1975 Act was to that extent weakened. Another relevant aspect of T's financial position was that she worked only a four-day week and (so it was argued for the defendant) she could increase her earnings if she chose to do so. However, he considered that her choice to remain in that employment was not unreasonable and that there was no rule of law obliging a claimant to be prepared to change jobs just because another job might pay more.
Summarising T's financial position, the judge concluded that her position was better than it would have been on a divorce; she had half the equity in the house, the

insurance policy proceeds and a widow's pension from the deceased's former employers; she had a satisfying job and no dependants; and if she could not make ends meet on her resources the deficiency arose almost entirely from her decision to acquire a horse (costing in the region of £4,000 per year) at a time when the marriage was dead and the deceased would never work again. However, he rejected the defendant's contention that she could reduce the deficit by taking a better-paying job; it was not unreasonable for her to continue in her current employment even though she was only required to work four days a week. He did not accept that she needed to continue living in the matrimonial home because of her alleged emotional attachment to it, nor that she needed a four-bedroom house; a local house-price search showed that accommodation adequate to her needs was available in the area at a price which did not require her to take on an overburdening mortgage. Therefore, despite the length of the marriage and the fact that it was nominally in existence at the date of the deceased's death, the claim failed.

Costs

Practitioners would do well to take note of what was said about costs. Where the personal representative is also the residuary beneficiary and is thus party to the claim in two capacities, the costs which can be set off in reduction of the value of the net estate will include the normal funeral, testamentary and administration costs, but will not include litigation costs other than those which an ordinary independent personal representative would have incurred, namely the costs of assisting the court by providing proper information about the content of the estate and other uncontroversial matters-in effect, the cost of complying with CPR r.57.16(5) and paragraph 16 of the Practice Direction, and any further directions of the court. In *Aston,* the defendant's litigation costs were £21,000, of which £1,000 was allowed in respect of that element of the costs.

1.2 *Baker v Baker*

Facts

Mr Baker (B) died unexpectedly on 17th November 2001, aged 61. He married the claimant, Mrs Susan Baker (W), on 8th August 1986, but they had begun to live together as man and wife in 1979, and four sons were born to them between then and 1983. Each had children from earlier relationships. W was aged 57 at the date of the hearing.

The two major assets of B's estate were the matrimonial home ("Dale House") and his scrap metal and vehicle recovery business ("Whip Street Motors") and the premises from which that business operated. B had made some provision for his family outside his will, so that on his death W received some £160,000 and the sons, about £20,000 each. The material provisions of his will dated 16th July 2001 were that:-

> Dale House was left to his trustees upon trust to permit W to live there during her widowhood but to sell it with her written consent in which event the proceeds of sale were to be held on trust for such of herself and the four sons who should survive him in equal shares
>
> The goodwill, machinery, plant, stock in trade and effects of Whip Street Motors, and the book debts owing to him in respect of that business were left to the four sons in equal shares absolutely. The trustees were given full power to carry on the business and to postpone its sale and conversion for as long as they thought fit.

> The residuary estate, which included the business premises, was given to the trustees upon trust for such of W and the sons who attained the age of 21 as survived him in equal shares absolutely.

It was common ground that the value of Dale House in its current state of repair was £340,000 and that the value of he business premises was £150,000 in its current state of use, but £327,000 if the lapsed planning permission for residential development were reinstated. However, the parties did not agree on either the value at death or the current value of Whip Street Motors (which the sons had carried on successfully since B's death) and the learned deputy judge was in effect requested to do his best in all the circumstances with the limited information available. He considered that at best he could provide only a possible range of figures and arrived at a figure of £600,000-£800,000 for the goodwill and other assets of the business which, added to the value of the business premises on the basis that they continued to be used for the business, Dale House, and the balance of funds in the estate, made up a total in the range £1.15-£1.35M.

The provision claimed

W's claim was for Dale House to be awarded to her absolutely together with a lump sum of £550,000 which would fund a net annual income need of £30,000 and leave a further £30,000 over as a contingency fund. The learned deputy judge had no hesitation in concluding that the will did not make reasonable provision for W but considered that her evidence failed to support an income need of that magnitude.

The award

The judgment took account of the fact that the four sons had, with the encouragement of their parents, worked in the business from an early age, possibly at the expense of their formal education, and had made a significant success of it. It was self-evident that the estate's interest in the current business was inextricably mixed with it and could not easily be separated out. Having regard to s.3(5), which directs the court to have regard to matters as they are at the date of the hearing, it was necessary to consider the impact of any award on the continuation of the business. A clean break award was appropriate and the concept of equality as explained by Wall LJ in *Cunliffe v Fielden* was referred to. Mrs Baker was awarded Dale House absolutely together with a lump sum of £410,000, which was over half the net estate on any footing.

The judgment does not deal with the income which that sum would produce, and indeed it was left to W to consider whether she should trade down from Dale House and buy a smaller and less expensive home in the vicinity. However, using the Duxbury tables based on the rate of return at the date of the hearing (20th March 2008) the sum awarded would fund a net annual income need of slightly more than £25,000. It had earlier been accepted that the level of lifestyle which she had previously enjoyed would have required an income of £20-25,000 per year, but the lump sum award was not arrived at by explicit reference to that particular circumstance.

1.3 Barron v Woodhead

This is one of the relatively few reported 1975 Act cases in which the surviving spouse was the husband.

Facts

Mrs Waite died on 3rd May 2003 having made a will dated 16th October 2002 by which she appointed the two children of her previous marriage to be her executors and left her residuary estate to them. The value of the net estate was £315,000 and the will made no provision for her husband (Mr Barron). The parties cohabited from 1986 and married in September 1993. The marriage was far from peaceful as both were heavy drinkers and there were incidents of domestic violence. The parties had separated by September 2001 at the latest, before which event Mrs Waite had consulted solicitors with a view to obtaining a divorce, but no proceedings were ever commenced. The matrimonial home was originally owned by Mr Barron who purported to convey his share in it to Mrs Waite and subsequently to convey the property to his brothers and sister. His trustee in bankruptcy commenced claims against him and against Mrs Waite's personal representatives. The latter claim was compromised on the basis that her estate should receive 25% of the net proceeds of sale, but at the hearing of the claim against him on 12th December 2007 both transactions were set aside and Mr Barron was ordered to give vacant possession to the trustee on 30th June 2008. His 1975 Act claim was heard on 25th June 2008.

The notional divorce

HH Judge Behrens considered the relevant law at some length. He referred to the decision of the Court of Appeal in *Re Krubert* which followed Oliver J's approach in *Re*

Besterman which involved treating this consideration as "merely one of the factors to which the court has to have regard" rather than regarding it as a starting-point as Waite J had done in *Moody v Stevenson*. He also cited that part of the judgment of Wall LJ in *Cunliffe v Fielden* which refers to equality and the observations of Lord Nicholls in the high net worth matrimonial cases of *Miller v Miller, McFarlane v McFarlane* to the effect that for the purpose of the exercise under s.25 of the Matrimonial Causes Act 1973 all property does not have to be treated in the same way by the judge when exercising his discretion and that there is a real difference between property acquired during the marriage otherwise than by gift, and other property.

However, he found it very difficult to assess what award would have been made if the parties had divorced in May 2003, particularly in view of Mr Barron's dealings with the matrimonial home. In his view the court would plainly have tried to ensure that he had a roof over his head but would not have been likely to award anything further if there was a risk of that further provision being claimed by Mr Barron's creditors.

Conduct

In relation to the incidents of domestic violence counsel for the defendants referred to *Re Snoek*. That was a case in which Wood J had considered the "atrocious and vicious" behaviour of the claimant sufficient to justify dismissing her claim entirely, though he did after taking other matters into consideration award her £5,000 out of an estate of some £40,000. HH Judge Behrens derived no assistance from that case, the facts of which he described as "a mile from the facts of this case"

The award

Factors that militated against an award in excess of what Mr Barron required for his maintenance were that he had had, and had dissipated funds since Mrs Waite's death, and that neither party had made a claim against the other in the 2-year period between their separation and Mrs Waite's death. Thus the determining factor was Mr Barron's needs, which were for a roof over his head and a lump sum to defray the costs of moving and setting himself up in another property, and to provide a cushion against future expenses. HH Judge Behrens directed that a sum of up to £100,000 be applied to purchase a flat or house for his occupation, to be agreed by the parties or, in default, selected by the court. His occupation was to be rent free for the rest of his life (he was 73 at the date of hearing) but he was to pay the outgoings. To the extent that the whole £100,000 was not used in the purchase, the balance was to be invested so as to maximise the income, which was to be paid to Mr Barron for life.

1.4 Comment

The cases continue to emphasise the difficulty of carrying out the "notional divorce" exercise required by s.3(2) of the 1975 Act, particularly where, as in *Aston v Aston* and *Barron v Woodhead*, the marriage had broken down and the parties had separated some years before the death of the deceased. They reinforce the view that the result of that exercise (in so far as it is capable of being carried out with the information available, which is not always the case) is merely one of the factors to which the court must have regard in determining whether reasonable provision has been made for the surviving spouse and, if not, the extent to which and the manner in which the court should exercise its discretion.
The two cases in which the claimant succeeded also illustrate the observations of

Wall LJ, relating to equality, at paragraph 21 of his judgment in *Cunliffe v Fielden*, which reads:-

> "Caution, however, seems to me necessary when considering the *White v White* cross-check in the context of a case under the 1975 Act. Divorce involves two living former spouses, to each of whom the provisions of s.25(2) of the Matrimonial Causes Act 1973 apply. In cases under the 1975 Act, a deceased spouse who leaves a widow is entitled to bequeath his estate to whomsoever he pleases; his only statutory obligation is to make reasonable financial provision for his widow. In such a case, depending on the value of the estate, the concept of equality may bear little relation to such provision"

Interestingly, in summarising the principles applicable to surviving spouse cases in *Barron v Woodhead*, HH Judge Behrens said:-

> "It remains the law that a deceased spouse who leaves a widower is entitled to leave her estate to whomsoever she pleases. Her only obligation is to make reasonable financial provision for her widower".

What underlies these observations and, in particularly, the last sentence of the passage from Wall LJ's judgment, is that in practice, the assessment of reasonable provision is going to begin with the claimant's reasonable housing and income needs. These may consume significantly more or significantly less than half the net estate, but in the latter situation (which is less commonly found in the reported cases) the court is under no compulsion to adjust the award upwards so as to attain equality.

Cases

***Aston v Aston* [2007] WTLR 1349**

***Baker v Baker* [2008] 2 FLR 1956, [2008] WTLR 1317**

***Barron v Woodhead* [2009] 1 FLR 747, [2008] WTLR 1675**

Re Krubert [1997] Ch 97, CA

Re Besterman [1984] Ch 458, CA

Moody v Stevenson [1992] Ch 486, CA

Cunliffe v Fielden [2006] 2 WLR 491, also reported as *Fielden v Cunliffe* [2006] Ch 361, [2006] 1 FLR 745, [2006] WTLR 29, CA

Miller v Miller, McFarlane v McFarlane [2006] 2 AC 618, HL

Re Snoek (1983) 13 Fam Law 19

White v White [2001]1 AC 596, HL

2. Cohabitants

It is quite usual for persons claiming as cohabitants under s.1(1)(ba) to claim in the alternative as dependants under s.1(1)(e) as a fail-safe position in case there is doubt whether the conditions of s.1(1A) or, as the case may be, s.1(1B) are satisfied. That was the position in two of the cases discussed in this bulletin, *Baker v Baker* (a different case from that discussed in section 1.2) and *Lindop v Agus*. In *Baynes v Hedger* there were two claimants, one claiming as a same-sex cohabitant under ss.1(1)(ba) and 1(1B), and the other as a dependant under s.1(1)(e). The claims in the other two cases discussed, *Negus v Bahouse* and *Webster v Webster*, were based only on cohabitation.

Alternative claims had previously been made in the landmark cases of *Re Watson* and *Churchill v Roach*. In *Re Watson* the claim based on cohabitation succeeded, so the claim based on dependency did not have to be determined, though Neuberger J held that it would have failed. The deceased's provision of rent-free accommodation for the claimant was not a substantial contribution to her reasonable needs, as she had a house of her own which she preferred not to live in; consequently, she was not being maintained by him. Conversely, in *Churchill v Roach* the cohabitation claim failed because the parties were living in separate establishments with separate domestic economies, but the dependency claim succeeded as it was found that the deceased was, immediately before his death, making a substantial contribution to the claimant's reasonable needs other than for full valuable consideration.

2.1 *Negus v Bahouse*

The litigation

As is not uncommon, other claims were determined at the same hearing as the 1975 Act claim. The litigation began with a claim by the executors for possession of the property (Flat 8) in which the claimant (N) was living when the deceased (B) died. N and B had previously lived together in another property (Greenways). Those properties had been successively bought by B in his own name after the start of their relationship. N counterclaimed under s.14 of TLATA 1996 for a declaration as to the extent of her beneficial interest in Flat 8, and for an order under s.2 of the 1975 Act. It was held, following *Stack v Dowden* that the onus was on N to establish that the beneficial ownership was different from the legal title, but her evidence was simply that she was to be at B's home and was to have a roof over her head if anything happened to him. That was insufficient to establish any agreement, arrangement or understanding that N was to have a beneficial interest in either Greenways or Flat 8.

Facts

N, who was then working as a dental receptionist at a salary of £15,000 par year, met the deceased (B) in 1995. He was a fairly wealthy man who had been married and divorced twice. On 24th January 1996 B made an English will leaving £75,000 to each of his three siblings and the residue to G, his only son by his first marriage. By agreement, the value of the net estate was taken as £2.2M for the purposes of the 1975 Act claim. B also owned a property in Spain which was left equally to N and G. In addition, they were nominated as the beneficiaries of his pension policy, valued at just under £1.15M. The relationship between N and B became serious in late 1996;

in 1997 she moved into his flat and shortly afterwards, at his request, gave up her job and became, in effect, a full-time housewife in all but name. He gave her a small allowance and they lived an expensive life-style with frequent foreign holidays. On one of these, in 1999, he bought her an expensive ring which N maintained was an engagement ring, though B's family did not accept that. In 2000 they began looking for a new home and, after difficulties with one property (Greenways), B acquired another (Flat 8) on a long lease in his own name, which became their home until B's death. In August 2004 B, who had been ill, developed type 2 diabetes, and also became severely depressed. The relationship became strained but HH Judge Kaye QC was satisfied that N had no intention of leaving B and that they continued to love and care for each other. On 27th March 2005 B committed suicide.

The parties' cases

On the 1975 Act claim, the defendants' case was essentially that N had no need for provision out of the net estate; she had received £459,000 from the proceeds of the Scottish Widows policy (of which she had £370,000 left at the date of the hearing), she stood to receive between £110,000 and £200,000 from her half share of the Spanish property, she was only 50 years of age with no dependants, and could return to work and expect to earn some £15,000 per year. As for her housing needs, she could return to the type of accommodation which she had before she met B.

N's case, put shortly, was that she had enjoyed a very comfortable life-style for the 8 years of cohabitation, in which she wanted for nothing, had a secure roof over her head and had given up work at B's request so that she could look after him and the home. Her needs were for continued security in her home and an income which would at least to some extent reflect her standard of living during the relationship.

The award

The evidence of N's financial position, both during the relationship and after B's death, was confusing and contradictory. However, the judge felt able to arrive at a figure of £38,000 per year to meet her reasonable outgoings, other than her housing needs. The remaining proceeds of the Scottish Widows policy, together with the £110,000 which was taken as the minimum value of the Spanish property, could, on a Duxbury basis, fund an income need of just over £25,000. This left an annual shortfall of £13,000 plus her housing needs to be provided for. He did not find it reasonable that she should return to accommodation of the kind which she had occupied before the relationship; although the assurances which B had given her were insufficient to found a claim to a beneficial interest in either Greenways or Flat 8, it was not unreasonable that she should have a modest long leasehold or freehold flat or apartment similar to Flat 8. He concluded that the will had not made reasonable provision for N and that the correct order was for Flat 8 to be transferred to her free of mortgage (or, if that were not possible, the sum required to pay off the mortgage should be transferred to her) and a lump sum payment of £200,000 to be made to her. That would still leave G with £1.7M plus his share of the Spanish property and the Scottish Widows policy monies.

The appeal

The executors sought to appeal against the order as being both too generous, and wrong in law. Rimer LJ had refused permission to appeal on paper; in summary, his reasons were that the judge had directed himself correctly on all relevant questions and that the grounds of appeal amounted to no more than an attempt to re-argue the case on the facts. On the renewed application, the Court of Appeal (Mummery LJ and Munby J) gave judgments upholding Rimer LJ's refusal.

In relation to the argument that the judge had approached the question of maintenance

incorrectly, and that the award was excessive, Mummery LJ drew attention to the often-cited dictum of Browne-Wilkinson J in *Re Dennis*, that "the word 'maintenance' connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at a rate appropriate to him". In his view, that statement permitted regard to be had to the fact that some people have a more expensive lifestyle than others. Similarly, it was plain to Munby J that in assessing what is reasonable maintenance, the court must have regard to the nature and quality of the lifestyle previously enjoyed by the applicant and the deceased.

There was no objective standard of what was reasonable for everybody; rather, the standard was flexible, to suit the circumstances of the case. Mummery LJ also referred to Lord Hoffmann's judgment in *Piglowska v Piglowski* from which it was clear that value judgments are judgments on which reasonable people can differ and that judges can have different views about what is reasonable without being overturned by the Court of Appeal. Both he and Munby J held that there was no real prospect of overthrowing HH Judge Kaye QC's judgment, and permission to appeal was refused.

2.2 *Webster v Webster & ors*

The litigation

The deceased (J) died intestate on 17th December 2004, survived by five children, three by his marriage, which took place in 1972, and broke down in 1977, and two by his relationship with the claimant (A), who had been a friend of his since 1970 and had cohabited with him since 1978. At the date of his death, the house in which J and A

were living was in J's sole name, and J also owned 4,000 shares in a company (MKM Building Supplies) for which he worked and of which he was a director. In the proceedings, A claimed a declaration that both the house and the shares were held upon trust for them as beneficial joint tenants, and in the alternative, an order under s.2 of the 1975 Act, and it was common ground that she was eligible either under ss.1(1)(ba) and 1(1A), or s.1(1)(e). J's children accepted that A had some interest in the house but not that she was a beneficial joint tenant of it, or that she had any interest in the shares.

Facts

A was 54 years of age at the date of the trial. Both she and J had worked throughout the relationship and contributed to the family budget. At the time of J's death, he had net annual earnings of £44,000 (£20,000 of this was dividend income from MKM). A's net annual earnings as a care home manager were £13,000 and there was no occupational pension. She received two lump sum payments totalling £148,500 following J's death and at one stage she had savings of £47,000, but by the date of trial these had been reduced to £28,000. For the four years from J's death to the date of trial, A had been paying the mortgage (about £350 per month, making roughly £17,000 over that four-year period) and all other outgoings of the house. Her annual income at the date of trial was £15,609 and her expenditure, excluding holidays, entertainment and hairdressing, but including the mortgage payments, was £20,975. She was not able to show in detail how she had spent her capital over the four years between J's death and the trial, but she said that she had spent some £30,000 on the house and her costs of the proceedings to date were £18,000, some of which she had already paid. J's five children, who would take on his intestacy, were all over 18,

in employment and none of them was suffering from any disability. They had not filed any evidence of their own means or of any special need.

To the nearest £1, the estate consisted of the house, the equity in which was £148,270, J's minority interest in MKM, which the directors had offered to buy out for £100,000, and a bank account with a credit balance of £19,495. Tax liabilities and administration costs amounted to £11,890 and the parties' costs to date were £42,800. None of the parties wished the house to be sold; if it remained unsold and the mortgage was not discharged, and the directors' offer taken up, there would be some £108,605 to pay such costs as were awarded out of the estate and to be distributed.

The claims to beneficial interests in the house and the shares

For A it was argued that, notwithstanding that the property originally acquired by J and all properties subsequently bought had been held in his sole name, this was a case in which a beneficial joint tenancy could be inferred. HH Judge Behrens considered *Oxley v Hiscock* and *James v Thomas*, and concluded that, while it was impossible on the facts of the instant case to impute to the parties an intention that A should acquire a beneficial interest in the house, her indirect contributions would found an inference that she had such an interest, which he would have put at 33-40% had it been necessary to quantify it. On the other hand, there was no such basis in respect of the shares. Their purchase was a business opportunity granted to J. The shares were vested in his sole name and the money which he borrowed to pay for them was secured on property in his sole name and in respect of which he was paying the direct mortgage contributions.

The award under the 1975 Act claim

It was not seriously disputed that the effect of the intestacy was such as not to make reasonable provision for A. There had been a long period of cohabitation during which two children were born to A and J. She clearly needed a roof over her head. Relations between A and the other three children were not good and a clean break was desirable. Apart from the poor relationship, problems would be created if A wished to effect repairs and improvements or to raise money on the property. It was not a suitable case for giving her a limited interest in the house; it should be transferred to her outright and the only question was whether there should be a further award to cover the outstanding mortgage. If the property were transferred to A free of mortgage, she would have sufficient resources to fund her present way of living other than holidays and the like, and the result of making that further award would be to reduce what remained for the beneficiaries by £2,400 each. They were all in employment and had no demonstrated needs. It was therefore ordered that the house be transferred to her free of mortgage.

2.3 *Baker v Baker*

Summary

In this case, Mr Baker (B) died of liver failure on 27th April 2005, having five days earlier, while in intensive care, made a will in which he appointed his brother (R) and Mrs Monica Hazel (H) executors, and left his estate (valued at £257,000) to H if she survived him for 28 days, and if not, to his daughter Cassandra (C) and Mrs Hazel's daughter Nicola (N) in equal shares. C, who was solely entitled to take on B's intestacy,

brought a claim that the will should be set aside on the grounds of lack of testamentary capacity and/or want of knowledge and approval, and for a grant of administration to her. No other will had been found. At trial H claimed a declaration as to her interest in B's house, in which they had been living before he was admitted to hospital on 7th April 2005 with his final illness; and an order under s.2 of the 1975 Act.

Claim to set aside the will

The medical evidence was that B was suffering from hepatic encephalopathy; his brain function was affected by his liver disease such that the consultant in his contemporaneous notes questioned B's capacity to make a will, and said to R and H some 2 hours before the will was executed, that he did not believe B to be capable of authorising or signing legal documents.

Apparently, some considerable time before B executed his will, he and H had discussed making wills in favour of each other, with the estate of the survivor being left to C and N. On 21st April B knew that he was dying and, in a conversation at which R, H and C were all present, said that he wanted to make a will and that he would do so in those terms if H did the same. R agreed to, and did, prepare the wills overnight. He visited B next day and B executed his will in those terms. However, H did not execute her will at the same time as B or at any time before B's death.

The deputy judge found that B did not have testamentary capacity when he executed the will. There was nothing to contradict the medical evidence, and on any view the effect of B executing his will without H also executing a will was significantly different from what B had intended and wished the previous day. In his judgment, if B had had capacity on 22nd April, he would have raised the question of H's will and taken steps

to ensure that she had executed it, failing which he would not have executed his own will. The only explanation was that, because of his encephalopathy, he did not understand what he was doing, and the will would not be admitted to probate.

Claim based on proprietary estoppel

In relation to that claim, the decision of the Court of Appeal in *Gillett v Holt*, and in particular the formulation in *Re Basham* of the relevant principles, was considered, as was the proposition of Robert Walker LJ that the various elements of proprietary estoppel should not be divided into watertight compartments; the fundamental principle was that equity is concerned to prevent unconscionable conduct and the court should look at the matter in the round.

In about 1987 or 1988 when B and H met, they each owned their own property. As the relationship developed they spent more time together, and pooled their resources to a greater extent; but they kept separate bank accounts, and when H moved out of her property to live with B she put in a tenant. Up till about 2001 H, like B, worked full time; but because of B's medical condition and short life expectancy they decided to spend as much time together as possible, and H took a part-time job. In 2003 H was diagnosed as having breast cancer. Following discussion with B she sold her property, and B allayed her anxiety by saying that he would take care of her and that their assets belonged to them both. Her proprietary estoppel claim was thus based on an alleged assurance or agreement by B and a reasonable expectation on her part that all his property would be hers on his death. It was found that there had been no such agreement or assurance; furthermore, she could have had no such reasonable expectation, because (among other matters) it was clear from the conversation on 21st April 2005 that he was only willing to leave his property to her if she reciprocated by

doing the same, with the survivor's estate going to C and N. That claim therefore failed

The 1975 Act claim

As no grant of representation had been issued, no order could be made at that stage. However, the parties agreed that the deputy judge should consider and rule on the claim on the material before him. C disputed H's claim as a cohabitant but was prepared to accept that she had a claim as a dependant. The deputy judge found, applying the test in *Re Watson*, that H and B had been living together in the same household as man and wife for considerably more than two years before his death and H was eligible to claim under s.1(1)(ba), so that s.1(1)(e) did not apply.

He considered H's principal maintenance needs were for a place to live and access to a reasonable capital sum from which she could supplement her limited income, which derived from part-time work from which she was likely to have to retire on reaching 65, and a monthly pension of £521.76. Her capital amounted to £92,000. The proposed order, which could not be implemented until C (if so entitled) had obtained a grant of administration, was that H should have a life interest in the deceased's house and its proceeds of sale, with the intent that if and when it became appropriate to sell that property, the proceeds might be applied in whole or part to the purchase of another property, or in being invested to provide further income for H. The balance of the estate would pass to C on B's intestacy.

2.4 *Lindop v Agus*

The litigation

This was the trial of the preliminary issue whether the claimant (L) was eligible to bring a 1975 Act claim under either s.1(1A) or s.1(1)(e) of the Act. Although they accepted that there was a relationship between L and the deceased (P), his executors did not accept either that L was living with P in the same household as his wife, or that she was being maintained by him immediately before his death other than for full valuable consideration.

Facts

L, who was born in 1969, was divorced; there was one child (R) of the marriage, born in 1995. Following the divorce, L and R initially went to live with L's father (B), though R had contact with her father (M) and left L to live with M in 2006. P, born in 1970, had had a number of relationships before meeting L. There was a child of one of those relationships, born in 1999. L and P met in 2001 while they were both working in the same dental practice. The relationship started some time after Christmas 2001 and in July 2002 P asked L to move in to his house, which she did gradually. Witnesses presented a consistent picture of them living together as a married couple from, at the latest, December 2003, until P's death in January 2007. They redecorated the house and bought furniture together, L bought most of the food and did most of the cooking, and they shared a bedroom. Weekends were arranged so that the two children could be together.

Law

The questions whether two people are living together in the same household, or as husband and wife, or both, have been considered in a number of contexts. Broadly speaking, the first question has caused little difficulty, but the second has given rise to a wider range of views.

In *Kimber v Kimber* there is a judicial dictum that, in general, two people are members of the same household if 'they live under the same roof, illness, holidays, work and other periodic absences apart'. This fits in well with the observation of HH Judge Norris (as he then was) in *Churchill v Roach* that the fact that the parties owned two separate properties was not necessarily fatal to their claim; what was fatal was that 'there were two separate establishments with two separate domestic economies'.

The 'check-list' approach to the question whether a man and woman were 'living together as husband and wife' for the purposes of the supplementary benefits legislation (exemplified by *Crake v Supplementary Benefits Commission*) has not been adopted in family provision cases, although it has been found useful in claims under the Fatal Accidents Act 1976; see *Kotke v Saffarini*.

Taking a broader view in the first reported 1975 Act claim by a cohabitant, Neuberger J said in *Re Watson* that 'the court should ask itself whether, in the opinion of a reasonable person with normal perceptions, it could be said that the two people in question were living together as husband and wife' which echoes (though without referring to) Ormrod LJ's way of putting the question in *Adeoso v Adeoso*-that is, whether 'to anyone looking at them from the outside...they were living together as husband and wife'. However, other judges have laid down a more stringent test. In

Southern Housing Group Ltd v Nutting the question arose whether the survivor of a same-sex relationship was entitled to succeed to a tenancy, the statutory criterion being that the survivor had been living with the tenant as his wife or husband. For Evans-Lombe J, that required the relationship to be 'openly and unequivocally displayed to the outside world'; and Lewison J expressed a similar view in *Baynes v Hedger*, which is discussed in section 2.5, below.

The decision

Counsel for the executors had drawn attention to a considerable amount of documentary evidence showing that during the period of alleged cohabitation, L was registered at her father's address on the electoral register and that her bank statements, P60s and other official documents were sent to her there. Although there was also some documentary evidence of her living at P's address, it was argued that the relationship failed to satisfy the test of being 'openly and unequivocally displayed to the outside world', since the 'outside world' included public authorities. That submission was not without force, but the weight of the evidence of those who had observed the relationship pointed to their living openly together and displaying that to the outside world. Consequently, L was entitled to claim under s.1(1A) of the 1975 Act.

The judge was also satisfied that L was being maintained by P immediately before his death, other than for full valuable consideration. P had provided a roof over L's head by allowing her to live with him, and he was paying the outgoings of the property. He also provided transport for L to get to work and paid for clothes and holidays and made other gifts. Although L had not produced her bank statements, that did not mean that she had not satisfied the burden of proof on the issue. Apart from L's oral evidence, it was clear that P had substantially more money than L. He was a fully

qualified dentist working full-time and it was inherently likely that he would have contributed substantially more than L. In those circumstances the defendant executors (who had not disclosed P's bank statements) could not rely on L's non-disclosure to assert that she had not satisfied the burden of proof. She was therefore also eligible to claim under s.1(1)(e).

2.5 *Baynes v Hedger*

The original claims

Henrietta Baynes (Hetty) commenced a claim for financial provision to be made for her out of the estate of her godmother, Mary Spencer Watson ("Mary"), on the basis that she was being wholly or partly maintained by Mary immediately before her death. Mary, who never married or had children, died on 7th March 2006, aged 92. Her will dated 6th July 1977, as amended by two codicils, included a gift of £2,500 to Hetty, a specific devise of the family home (the Dunshay Manor estate, value about £2M) to the Landmark Trust, and a gift of residue to her friend Margaret Alice Baynes (Margot) for life, remainder to Margot's children other than Hetty who was excluded because she had already benefited.

Margot, who, as a residuary beneficiary under Mary's will, was a defendant to Hetty's claim, made alternative claims under s.1(1B) on the basis that she was living in the same household as Mary and as her civil partner during the whole of the two years preceding Mary's death, and also under s.1(1)(e) on the basis that she was being wholly or partly maintained by Mary immediately before her death. Lewison J dismissed both limbs of Margot's claim and she did not appeal. On Hetty's claim, he

found that she was a person who was being partly maintained by Mary immediately before her death, but that in all the circumstances the will did not fail to make reasonable provision for her. He therefore dismissed her claim also.

Hetty's appeal

On appeal, Hetty contended that the will did not make reasonable provision for her, while the respondent charity, the Landmark Trust, sought to uphold the judge's order on the further ground that Hetty was not a person who had been maintained by the deceased immediately before her death. Sir Andrew Morritt C, giving the only substantive judgment, held that Hetty was not a person who was being maintained immediately before the death of the deceased, and dismissed the appeal on that ground. Consequently, the issue whether the will made reasonable provision for her maintenance did not arise, but the question was considered briefly and the finding at first instance affirmed.

Family history

The Dunshay Manor estate was acquired in 1923 by Mary's father and became the family home. In about 1955, Mary (who continued to live on the estate) leased Dunshay Manor to a Mr Baynes, who was then married to Margot; at that time they had four children, and Hetty was born in 1956. An intimate relationship between Mary and Margot soon developed, Mr Baynes left Dunshay Manor and eventually he and Margot were divorced. Mary became a quasi-parental figure and a dominant influence in the lives of the Baynes children, was generous to them financially in their younger days, and continued to be generous, particularly to Hetty and to Margot. Until the late 1970s, Mary and various members of the Baynes family were living together, first in Richmond and then in Fife Road, Sheen. When the Richmond house was sold in 1972, Mary settled £15,000 upon trust for Margot for life, remainder to Hetty for life and then to Hetty's children.

By the late 1970s Mary was living mainly at Dunshay, while Margot remained in London. In 1978, Mary bought a house in Barnes which was effectively a gift to Margot, and a flat in Kensington for Hetty. At the time of Mary's death, Margot was still living in the house in Kingston-on-Thames which she had bought in the early 1990s from the proceeds of sale of the house in Barnes.

Margot's cohabitation with Mary

Both in the Richmond house and in Fife Road, Mary and Margot shared a bedroom and were seen as a couple. There was evidence that when Margot was living in Kingston-on-Thames, Mary was regularly seen there and would stay for a week-end and sometimes for a couple of weeks. This would happen every month or two. Margot would also go to stay with Mary at Dunshay every three months for a weekend or a week but these visits became less frequent as Margot's health deteriorated due to Alzheimer's syndrome, which was diagnosed in 2000. Mary, however, continued to visit Margot at weekends and Christmas and Margot's carer from October 2005 onwards gave evidence that Mary would come for a weekend every other week and stay for three or four days. Each had a room in the other's house where she kept clothes and other possessions.

Lewison J found that, since the late 1970s, the settled pattern of residence was that Margot's main residence was in Kingston and Mary's at Dunshay, and that Mary regarded the Kingston property as Margot's home, not a joint home or one in joint names; similarly, she regarded Dunshay as her home, not as the (or a) joint home of theirs. Her 1977 will left Dunshay unconditionally to charity and she never consulted Margot about her dispositions of it. For at least the last 20 years, they did not in any real sense live under the same roof; and in the last two years of Mary's life, the

relevant statutory period, Margot's need for 24-hour care made it impracticable for her to go to Dunshay, while Mary was never more than a visitor to Kingston. There were two separate establishments and two separate domestic economies. That would have been sufficient to dispose of Margot's claim as a cohabitant, but, additionally, the true nature of the relationship between them was never acknowledged to the outside world. In his judgment it was not possible to establish that two people lived together as civil partners unless their relationship as a couple was an acknowledged one; consequently, her claim under s.1(1B) failed.

Margot's dependence on Mary

Over the years of the relationship, the benefits which Margot received from Mary consisted of the house bought for her in 1978, income from the 1972 settlement of £2,000-3,000 per year from 1996/97 to 2003/04, payments of about £8,000 per year in total for home help and grocery bills which also ceased in 2003/04, when capital was advanced to Margot from the trust fund.

In the summer of 2003 there were concerns expressed about the level of care that Margot was receiving and following a family meeting which broke up without agreement, it was decided that the trust fund comprised in the 1972 settlement (which by then had a value of £55,000) would be used to pay for her care. On 24th August 2003, Mary consented to the capital of the trust being advanced to Margot for that purpose. Thereafter there were two one-off payments totalling £1,600 and a contribution of £50 per month which did little more than cover the cost of her own visits to Margot. There was no evidence of Mary providing in any other way for Margot's care thereafter.

Lewison J rejected the argument that either the purchase of the house or the capital advances from the settlement constituted maintenance. He drew attention to the use of the words "was making a substantial contribution" in s.1(3) of the Act and considered that this suggested a continuing action on the part of the donor, not a one-off, completed act. Providing rent-free accommodation or allowing someone to live in one's property at a concessionary rent could be a continuous provision, but an outright gift of a house 30 years previously was not. That contribution towards Margot's reasonable needs was made when the gift was made and the house became Margot's house to do as she pleased with.

As to the advances out of the settlement, once the money had been settled it ceased to be Mary's money. The fact that Mary was a trustee of the settlement and thus a party to the exercise of the power of advancement did not alter that. Those contributions to Margot's maintenance came from the settlement, not from Mary. Accordingly, none of the benefits conferred on Margot by Mary could be regarded as "maintenance" for the purposes of the 1975 Act and that claim also failed.

Hetty's dependence on Mary

From 1986 until shortly before Mary's death, there was a continuous history of Hetty getting into financial difficulties and Mary rescuing her, sometimes with gifts, and at other times with loans which were to be repaid on various terms. During this period Hetty married, had a son, was divorced, and was awarded financial provision consisting of a lump sum payment of £235,000 and periodical payments of £500 per month for her son's maintenance. The loans made between 1986 and 1999 were repaid in 2000, but later that year Hetty was in difficulties again. Mary borrowed money from her bank in 2001 and twice more in 2003; before the second of those

payments was made to Hetty, a meeting took place at which Mary's accountant was present and at which Mary made plain to Hetty that this was the last time she would assist her. She did make a series of small cash payments to her in late 2005, to which she referred as "stop-gap" payments. In January 2006 Mary made it clear both in writing and orally that she no longer considered herself to have any responsibility for supporting Hetty, and despite further pressure from Hetty she did not provide her with any more money.

On this issue, Lewison J considered the contributions Mary was making towards Hetty's reasonable needs immediately before her death, whether they were substantial, and whether they were made otherwise than for full valuable consideration, immediately before her death, He identified payments of £3,000 plus a generous Christmas present in 2004, and about £8,200 in 2005, part of which was the "stop-gap" payments which were expected to be repaid. He concluded that, by a narrow margin, these payments were "substantial". The payment of Hetty's mortgage for six months in 2005 was an arrangement strictly limited in time; it ceased in January 2006 and did not count as maintenance. He was also persuaded that, in so far as the sums paid by Mary were loans to Hetty, they were "soft" loans, that is, they were interest-free, would not be enforced, did not have to be repaid and were in fact unlikely to be repaid. They were therefore made for less than full valuable consideration and qualified as maintenance. Hetty was therefore eligible to make a claim as having been partly maintained by Mary immediately before her death.

In determining whether the will failed to make reasonable provision for Hetty, Lewison J considered Hetty's financial position; whether and, if so, what obligations Mary had to her, Margot and the other beneficiaries, and Hetty's conduct. Two particular aspects

of that conduct were the way in which she had dealt with the substantial assets that Mary had given her over the years, and the pressure which she was exerting on Mary towards the end of her life to make further financial support available to her. He concluded that in all the circumstances the will did not fail to make reasonable provision for her, and her claim therefore failed.

Hetty's appeal

On appeal it was accepted on behalf of Hetty that an assumption of responsibility for the claimant's maintenance was an essential ingredient in the qualification of a person entitled to make a claim under s.1(1)(e). However, since the decision of the Court of Appeal in *Jelley v Iliffe*, it has generally been held that if the deceased was in fact maintaining the claimant, there was at least a rebuttable presumption that he had assumed responsibility for doing so; see. e.g., *Williams v Roberts*, *Rees v Newbery and The Institute of Cancer Research* and *Churchill v Roach*.

Sir Andrew Morritt's analysis of this question was that, in order for Lewison J to conclude (as he did) that Hetty was being maintained by Mary immediately before her death, he must have considered whether Mary had assumed responsibility for Hetty's maintenance; but the facts which he found did not support such a conclusion. Lewison J had emphasised that Mary's primary concern in the period before her death was to pay off Hetty's existing debts. He said:-

> "The payment of those debts is not 'maintenance' for the purposes of Hetty's claim. Mary had disclaimed any responsibility for Hetty's continuing support or providing Hetty with a home, and Hetty knew it"

Therefore, in Sir Andrew Morritt's judgment, Hetty was not being partly maintained by Mary; thus she failed to satisfy the requirements of s.1(3) and was not eligible to make a claim, so the question whether the will failed to make reasonable provision for her did not arise. He did, however, hold that if it had been necessary to decide that question, he would have agreed with Lewison J's finding that it did not.

2.6 Comment

The cases discussed above have thrown up the following points which are likely to be of fairly general application.

1. In meeting the reasonable housing needs of a cohabitant, the courts are increasingly awarding absolute rather than limited interests in the property in which the cohabitant is to live (though the claimant in *Baker v Baker* was awarded a life interest). This accords with the general practice of making "clean break" awards and will be particularly appropriate where the relationships between the cohabitant and other members of the deceased's family are not harmonious; see *Negus v Bahouse*, *Webster v Webster*.

2. In assessing the reasonable needs of a cohabitant, whether for housing or income, the court should have regard to (but was not obliged to replicate) the general manner and standard of living which the claimant enjoyed during the relationship; *Negus v Bahouse*, *Webster v Webster*.

3. A court, in deciding whether a will has failed to make reasonable provision for the claimant, may well take an unfavourable view of improvident behaviour on the

part of the claimant-see *Baynes v Hedger* and also the surviving spouse case of *Barron v Woodhead* discussed in section 1.3.

4. Recent cases suggest that in order for the requirements of ss.1(1A) and 1(1B) of the 1975 Act to be met, the claimant will have to satisfy the court that the relationship with the deceased was not merely capable of being reasonably perceived as one of husband and wife (as in *Re Watson*) or civil partnership, but was in some way openly acknowledged as such; see *Lindop v Agus, Baynes v Hedger*.

5. Point 4 may assume greater importance if one of the Law Commission's provisional proposals for reform of the law of family provision is adopted. The provisional proposal is that reasonable provision for cohabitants should be of the higher standard which is at present available only to surviving spouses. In those circumstances it would no longer be a matter of indifference whether a claim in the alternative succeeded on the basis of cohabitation or dependency.

Cases

Re Watson [1999] 1 FLR 998

Churchill v Roach [2004] 2 FLR 989, [2003] WTLR 779

Stack v Dowden [2007] 1 FLR 1858, HL

***Negus v Bahouse* [2008] WTLR 97, [2008] 1 FLR 381.** The hearing of the application for permission to appeal took place on 28th February 2008 and is unreported; the official transcript of the hearing is WL 4820354.

Re Dennis [1981] 2 All ER 140

Piglowska v Piglowski [1999] 1 WLR 1360

***Webster v Webster & ors* [2009] 1 FLR 1240, [2009] WTLR 339**

Oxley v Hiscock [2005] Fam 211, [2004] 2 FLR 669, [2004] WTLR 709

James v Thomas [2007] EWCA (Civ) 1212, [2008] 1 FLR 1598

***Baker v Baker* [2008] 2 FLR 767, [2008] WTLR 565**

Gillett v Holt [2001] Ch 210, [2000] WTLR 195, CA

Re Basham [1986] 1 WLR 1498

***Lindop v Agus* [2009] WTLR 1175**

Crake v Supplementary Benefits Commission [1982] 1 All ER 498

Kotke v Saffarini [2005] 2 FLR 878

Kimber v Kimber [2000] 1 FLR 383

Adeoso v Adeoso [1980] 1 WLR 1535

Southern Housing Group Ltd v Nutting [2005] 2 P & CR 14

***Baynes v Hedger* [2008] 2 FLR 1805, [2008] WTLR 1719; on appeal (*affd*) [2009] 2 FLR 767, [2009] WTLR 759.**

Jelley v Iliffe [1981] Fam 128, CA

Williams v Roberts, [1986] 1 FLR 349

Rees v Newbery and The Institute of Cancer Research, [1998] 1 FLR 1041

3. Children of the deceased

3.1 Challinor v Challinor

Facts

The deceased (G) had been married twice. The claimant (E) was the younger daughter of G's first marriage, which was dissolved in 1974. She was 49 years of age and had been diagnosed as suffering from Down's syndrome at a very early age. After the breakdown of G's marriage E lived with her mother and then with foster parents, but from 1991 onwards she lived in a residential home (Bystock). G remarried in 1974 and in January 1991 he made a will leaving his entire estate to his second wife (S). On G's death in March 2006, E's elder sister, subsequently her litigation friend (A) became concerned that G's will had not made reasonable provision for E. E's care home fees had been paid by a combination of benefits and a local authority top-up, and G and other members of the family contributed to the cost of her other needs. At Bystock, she had a bank account into which her personal spending allowance and cash gifts were paid, and the balance was maintained at about £3,000. She had no other resources.

G's net estate was valued at approximately £55,000, but at the date of his death he had assets, jointly owned with S, valued at £531,191, half of which represented the severable share which could be treated as part of his estate under s.9(1). In addition to the assets passing to her by survivorship, S had assets in her own name of some £627,000 and her net income in recent years from employment and dividends had been in the region of £35,000.

The deceased's wishes

An issue arose whether G had created a trust of any assets to be used for E's benefit, or whether an understanding to that effect existed, but it was found that there was no evidence of a trust, and insufficient evidence to support A's belief in any such understanding. The only provision which G had made for E during his lifetime was a fund of National Savings Certificates initially of £10,000, worth £15,000 at the date of the hearing. He had expressed the wish that any unforeseen requirements after his death could be met as a matter of moral obligation, out of the assets passing to S. Her stance was that this fund would make reasonable provision for E's needs and if she were to make any contribution to E's needs she would expect A to do so as well. In view of this attitude Cooke J considered that it would not be sufficient to rely on the moral obligation falling on S and that provision should be made for E from the estate.

The award

E's needs were assessed by reference to the medical evidence of the deterioration in her condition and the additional care, equipment and facilities which she might reasonably require in consequence. From the medical evidence it was concluded that her life expectancy was unlikely to be much more than 10 years. It was not considered likely that she would have to move from residential to nursing care in the near future and there was no evidence to suggest when, if at all, such a move might be required or, if there was a move, E's local authority funding would be adversely affected. Cooke J concluded that E's reasonable needs could be met by a fund of £100,000, which would include the £15,000 in National Savings Certificates. The fund should be settled on discretionary trusts such that if it was not exhausted at E's death, the balance should revert to S. G's severable share of the jointly owned assets should be brought into the estate to the extent necessary to make this provision.

3.2 *Bye v Colvin-Scott*

Summary

This is another case involving multiple claims. The deceased (S) died on 26th August 2006 leaving an estate of which the only significant asset was a flat subject to two charges and in which there was an equity of about £160,000. On 15th November 2005 S had made a will appointing her brother (B) as executor and leaving her residuary estate (which included the flat) to B and her two sisters, M and K. S also had a daughter (E) who had lived at the flat since she was a child, and who continued to live in it after S had been admitted to hospital on 17th May 2004, where she remained (except for periods amounting to 33 days in all) until her death over two years later. B obtained a grant of probate on 17th November 2006 and commenced possession proceedings against E on 21st December 2007.

E counterclaimed on the basis of proprietary estoppel and also on a document signed by S in 2006, some months after the making of her will, giving her the right to occupy the flat for her lifetime. She was also permitted to make a 1975 Act claim out of time, her application to do so being unopposed. The will made no provision for her other than the gift of a diamond ring.

S's medical history.

S had suffered from epilepsy and had a long history of alcohol abuse until about 1999 when she stopped drinking. She also had long-standing depression and a propensity to self-harm. Towards the end of her life she was suffering from Parkinson's disease. The relationship between S and E was noted by the

community psychiatric nurse as being difficult in 2003, and in 2004 there was a further note referring to S's mobility problems and that E had agreed to assist with shopping, housework, laundry and cooking the main meal. It was E's case that she had cared for S for a number of years, albeit while working full-time, and had continued to do so when S went into residential care, and that this had adversely affected her educational and career prospects.

The 2006 document claim

There were, in fact, at least two, and possibly three versions of this document, which purported to grant a life interest in the flat to E. However, HH Judge Williams found (particularly since for some months previously S had wanted to sell the flat, preferably to E) that when the document was signed, S did not know what she was doing, nor did she intend to grant a life interest to E. It was clear that that idea had emanated from E and it was more likely than not that S would have repudiated the document had she seen it in her lifetime.

The proprietary estoppel claim

The judgment follows the well-established analysis of assurance or representation, reliance, and detriment suffered as a result of such reliance, and then considers whether in all the circumstances it would have been unconscionable for a testator to make a will giving specific property to (say) X, if by his conduct he has already aroused an expectation in (say) Y that he will inherit it. However, unconscionability will not suffice to establish such a claim in the absence of the other elements. Such disruption to E's social life, work and education as were suffered by E, and such expense as she had incurred, were found to amount to only marginal detriment. Additionally, the judge concluded that even had it been substantial enough to allow

E to acquire an equity in the flat, that was more than negated by her conduct towards S, which had been psychologically, emotionally and probably financially abusive. That conduct disqualified her from acquiring any interest in, or right to occupy the property. It would not be inequitable or unconscionable to disregard such assurances as had been made.

The 1975 Act claim

The judgment relies on a passage from *Robinson v Fernsby* in which the Court of Appeal referred to the objective nature of the test of whether reasonable provision had been made and the necessity for the claimant to establish some moral claim to be maintained by the estate of the deceased beyond the mere fact of the blood relationship. S had been providing E with a home but that did not give E a moral claim to be maintained by S's estate. Further, there was evidence that S did not want to make any provision for E because of what she perceived as E's abusive treatment of her; a perception shared by other witnesses. E had, against S's wishes, taken her to a new solicitor to make a new will and execute an enduring power of attorney, and had also obtained her signature to a document purporting to give her a life interest in the flat. E was able to support herself and it was understood that she could, if she were willing and able, purchase the flat for considerably less than its market value. S had not incurred any obligation towards or responsibility for E and was providing for her against her own wishes in so far as E continued to live in her property, thereby preventing it from being sold so that sheltered accommodation could have been purchased for S. All these matters of conduct were relevant and, taking them into consideration, the will did not fail to make reasonable provision for her.

3.3 *H v M and ors*

This case (a full report of which has appeared in the February 2010 edition of Wills and Trusts Law Reports), has also been briefly reported at [2010] Fam. Law 343 under the title *H v J's Personal Representatives, Blue Cross, RSPB and RSPCA*, with commentary by Professor Rebecca Bailey-Harris. It is due to be fully reported in [2010] 2 FLR.

The relationship between the claimant and the deceased

The deceased (J) died on 10th July 2006, leaving a net estate of £486,000. J's daughter H, born on 7th September 1960, was the only child of J's marriage, which was cut short when her father died in an industrial accident. In 1977 H formed a relationship with N, of whom J strongly disapproved, and this led to a profound disagreement between J and H. H left home secretly in 1978 to live with N in his parents' home, and married him in 1983. There were five children of the marriage, born between 1984 and 1996.

There were three relatively brief reconciliations between J and H. The first was in mid-1983 when J learnt that H was pregnant with her first child. Despite that reconciliation, J executed a will on 21st March 1984 totally excluding H. The will was accompanied by a letter of wishes which explained her reasons for doing so by reference to H's leaving home and marrying N. The second took place in 1994 following an accidental meeting between J and H and lasted for less than three months. The third, in late 1999,was again the result of a chance meeting following which H apologised to J for the distress she had caused. J responded to this by asking for the apology to be committed to writing in order to show her solicitor that she (H)

was really sincere about the relationship, and that apology was duly sent. However, the relationship broke down once more, apparently because the name H had chosen for her youngest child (born some three years previously) offended J. On 16th April 2002 J executed another will, with a further letter of wishes giving the same reasons for H's exclusion, and shortly afterwards wrote to H telling her what she had done. H's reply did not prompt any change in J's attitude.

The hearing at first instance

H's claim for provision out of J's estate was heard by a district judge in May 2007. Her financial circumstances was that she, N and their four youngest children lived in a three-bedroom house rented from a housing association; she had not done any paid work since their first child was born in 1984, when she and N decided that she would be a full-time mother. N worked part-time but some 75% of the family's annual income of just over £14,000 derived from state benefits; the family also received housing and council tax benefit. By an order finally perfected in December 2007, the district judge awarded H £50,000.

The appeal

In January 2008 H appealed against that order contending that the sum awarded was insufficient, and the three charities to whom J's residuary estate had been left cross-appealed, contending that the district judge had failed to apply the law correctly and that, had he done so, he would have concluded that the will did not fail to make reasonable provision for H.

The judgment emphasises, by reference to the judgments of Buckley and Goff L.JJ in *Re Coventry*, that in determining whether the will failed to make reasonable provision

for the claimant, the question was not whether it might have been reasonable for the deceased to have provided for him, but whether, viewed objectively, the dispositions (or lack of dispositions) produced an unreasonable result in that no, or no greater provision was made for the claimant. As Munby J put it in *Re Myers*, in the final analysis the matter has to be judged by reference to the objective results of what [the deceased] did, rather than by reference to his subjective reasons.

The judgment also makes it clear, citing the observations of the Court of Appeal in *Re Hancock* and of Butler-Sloss LJ in *Espinosa v Bourke*, that there is no threshold requirement that a claimant who is an adult child must demonstrate the existence of some special circumstance or moral obligation in order to succeed. However, if the claimant is of working age with a job, or capable of obtaining a job which would be available, it would be necessary to identify some very weighty factor to establish that there had been a failure to make reasonable provision, typically some obligation owed by the deceased. The mere existence of financial need, as Oliver J had held in *Re Coventry*, is insufficient to support a claim.

Eleanor King J analysed the judgment of the district judge in some depth, and the following passage which she quotes from his judgment clearly demonstrates the error into which he fell:-

> "I am satisfied therefore that the rejection by the mother of her only daughter at the age of 17, and which she then maintained for the rest of her life was unreasonable and this has led to J unreasonably excluding her daughter from any financial provision in her will, despite her daughter's constrained and needy financial circumstances and her daughter's wish for and attempts at reconciliation..."

As she put it, he was so concerned with the rights and wrongs of the attempts at reconciliation that he asked himself the wrong question. To alter the dispositions of J's will because she had acted unreasonably was to undermine the basic premise, which applied in this jurisdiction, of freedom of testation. Looked at objectively, H had no expectation of inheriting anything from J and the length and depth of the estrangement negatived any idea that any obligation could arise out of the relationship. The 'ordinary family obligations of a mother towards her only child who was an independent adult' to which the district judge had referred were not the kind of weighty factor envisaged in *Espinosa v Bourke*.

While not without a measure of sympathy for H in her situation, the court would decline to interfere with the validly expressed intention of the testatrix towards her adult child unless the factors specified in the 1975 Act were such as to tip the balance in favour of such interference. The appeal would be dismissed and the cross-appeal allowed; the order of the district judge would be set aside and an order dismissing H's claim substituted.

3.4 Comment

In *Challinor*, as one would expect where the claimant had been disabled from birth and the beneficiary had substantial assets apart from those which passed to her under the deceased's will and by survivorship, the claim succeeded. However, the judgment makes it clear that, when quantifying such a claim, the assumptions made in relation to the claimant's life expectancy, the nature of the anticipated additional expenditure likely to be incurred for the claimant's benefit, and the continuance of local authority funding, must be supported by evidence showing them to be realistic. The claim as quantified by the claimant's litigation friend was for £275,000; the amount of provision awarded from the estate was £85,000.

The other two cases both involved issues of conduct, which does not usually play a significant part in 1975 Act claims. In *Bye v Colvin-Scott*, the abusive conduct of the claimant towards her mother was a major factor in the dismissal of her claim. There is as yet no reported case in which an otherwise viable claim has been dismissed on the grounds of the claimant's conduct and, in the light of the judgment of Eleanor King J in *H v M and others*, it is unlikely that Ms Colvin-Scott's counterclaim under the 1975 Act would have succeeded even had she not engaged in that course of abusive conduct, since she was capable of, and was in fact, supporting herself. The cases in which claims by adult children capable of earning their own living have succeeded fall into two main groups; those where the deceased was under an obligation to dispose of property for the benefit of the claimant and had not done so (*Re Goodchild, Espinosa v Bourke*) and those in which the claimant had worked for little or no remuneration in the deceased's business in the justified expectation that he would benefit under the deceased's will, whether by way of the business or an interest in it, or otherwise; see, e.g., *Re Abram* and *Re Pearce*. There is also the situation mentioned in *Re Coventry*, but which has not appeared in any reported case-the claimant giving up the prospect of an independent life in order to look after the frail or elderly deceased.

Cases

***Challinor v Challinor* [2009] WTLR 931, [2009] EWHC 180 (Ch)**

***Bye v Colvin-Scott* [2010] WTLR 1**

Robinson v Fernsby [2004] WTLR 257

***H v M and ors* [2009] EWHC 3114 (Fam), [2010] WTLR 193**

Re Coventry [1980] Ch 458

Re Myers [2005] WTLR 851

Re Hancock [1998] 2 FLR 346

Espinosa v Bourke [1999] 1 FLR 747

Re Goodchild [1996] 1 WLR 694, [1996] 1 All ER 670, *affd.*, [1997] 1 WLR 1216, [1997] 3 All ER 63, CA

Re Abram [1996] 2 FLR 379

Re Pearce [1998] 2 FLR 705

4. Miscellaneous

Of the three cases discussed in this section, the most important is the recent decision of the Court of Appeal in *Holloway v Musa*, on the acquisition of a domicile of choice. Of the other two, one is (as is the occasional custom of Wills and Trusts Law Reports) an old unreported case which is thought worthy of being disinterred. An editorial note states that the case is reported to provide guidance only, there being no other report available. The other is an unreported first instance decision which contains a useful analysis of the status of an award under the 1975 Act in the context of enforcement of judgment debts.

4.1 *Holloway v Musa*

The domicile question arose as a preliminary issue in a 1975 Act claim by Diane Holloway, as a cohabitant, for provision out of the estate of Ramadan Hussein Guney (referred to in the judgment as Ramadan) who had been born in Cyprus but was adjudged at first instance to have been domiciled in England and Wales when he died on 2nd November 2006. It was common ground that he had lived in England at various addresses from 1958 until his death in 2006, aged 74. The only issue was whether it could properly be inferred that he had, at any stage of his lengthy residence in England prior to his death, formed the intention to settle in England indefinitely and abandon his domicile of origin.

As the judgment makes plain, there is no one fact which is decisive on that issue, and the authorities are of limited value, since domicile questions are always highly fact-sensitive. However, the decision of the Court of Appeal in the case of *Cyganik v Agulian* provides some useful guidance, not because of the superficial fact similarities but because the same issue arose. The judgment sets out the classical analysis of Scarman J in *Re Fuld* which was quoted at some length in *Cyganik v Agulian* and which emphasises the need in each case for a detailed analysis and assessment of facts in relation to the subjective state of mind of the individual in question. It is clear from Scarman J's exposition that if that individual has settled in a country other than that of his birth and has a fixed intention to return there on the happening of a certain contingency, the intention to remain is lacking; but if there is only a possibility of returning on the happening of some vague and uncertain event, that state of mind would be consistent with his having formed the necessary intention to remain.

The length of residence is not in itself determinative; in *Cyganik v Agulian* it was found at first instance that the deceased had not formed the intention to reside permanently in England after 34 years' residence, but only when, four years later, he and the claimant had decided to marry. Mummery LJ emphasised, on the appeal in that case, the importance of looking at the deceased's life as a whole and not isolating any particular factor (in that case, the intended marriage) and treating it as decisive. It is of course true, as Waller LJ said in *Holloway*, that Ramadan's long residence in England was a starting point; his family home was there both during his marriage and his subsequent relationship with the claimant. It was common sense that the longer the residence and the more firmly his home was rooted in England, the more likely it was that he had formed the requisite intention. But it was clear from *Re Fuld* that if at the date of his death he had not finally made up his mind, his domicile of origin persisted. Waller LJ then went on to set out a chronology of significant events relating both to those factors which might point to England as the place where he had chosen to settle and those which might indicate that he had not abandoned Cyprus.

In addition to that chronology, it was important to take into account that the relationship between Ramadan's adult children and Diane, particularly once Ramadan died, was not good and that each had an axe to grind. Diane would only obtain a share of the estate for herself and her children if Ramadan had died domiciled in England. The adult children could only keep Diane away from that share if he had died domiciled in Cyprus. It was also right to approach with caution any declarations made by Ramadan to the Inland Revenue, though they should not be ignored where consistent with the facts. So far as the Revenue were concerned his talk of retiring to Cyprus was probably an attempt to establish "non-dom" status. When he died, aged 74, he had taken no step towards retirement there. His diary was more likely to be reliable and in it he referred to living in England and holidaying in Cyprus. The intended purchase of a larger house for his family and the extension of the mausoleum where his wife was buried indicated that that he had made up his mind, consistent with his permanent home being in England, that that was where he wished to end his days and be buried. Accordingly, the decision at first instance, albeit reached by a somewhat different route, was upheld.

4.2 *Re Nobbs deceased, Midland Bank Trust Company v Nobbs*

Summary

The appeal arose out of consolidated proceedings, all of which related to the estate of Jack Albert Nobbs. One of these was a claim by his widow (W) for provision out of his estate under s.2 of the 1975 Act. When the proceedings came on for trial, W was absent in the United States for medical treatment, although she knew when the trial was listed to begin and that she was required to attend for cross-examination on her affidavit evidence. She did not inform her solicitors that she would be absent and no medical evidence was before the court. In those circumstances her claim was dismissed. She appealed and the trustees of the estate applied for an order for security for costs of the appeal. The Court of Appeal held that the occasion for the appeal had arisen from her own conduct in the court below. *Prima facie* it was vexatious, and vexatiousness had always been a legitimate ground for ordering security for costs; it was no less a legitimate ground when the litigant was legally aided. Impecuniosity was also a long-standing ground for ordering security for costs. W was ordered to provide security in the sum of £2,000.

4.3 Comment

CPR r.25.15(1)(a) provides that security for costs of an appeal may be ordered against an appellant on the same grounds as against a claimant. Under r.25.13(1), the court may make such an order if it is just to do so and if one or more of the conditions in paragraph 2 applies. Those conditions include neither the vexatiousness of the claim nor the impecuniosity of a claimant who is an individual. Had W been resident in the United States, condition 2(a) would have applied, but she was merely there to obtain medical treatment. It seems highly improbable that the same order would be made under the existing provisions of CPR r.25.13, so it is not apparent that the case now provides any useful guidance.

4.4 Lansforsakringar Bank AB v Wood and ors

Summary
In proceedings under the 1975 Act, Patten J had awarded the claimant, Dr Malcolm Wood, the sum of £300,000 out of the residuary estate of his late mother. Lansforsakringar Bank AB ("the Bank") were attempting to recover from Mrs Wood's executors or Dr Wood a judgment debt plus interest, amounting to some 1.25M Swedish krona (approximately £97,000). The Bank obtained an interim third party debt order under CPR r.72(4) but Master Leslie refused to make that order a final order under r.72.2(1)(a). In *Lansforsakringar Bank AB v Wood and ors*, Patten J upheld the Master's decision. He held that the sum of £300,000 was not "a debt accruing due to the judgment debtor" (Dr Wood) "from the third party" (the executors of Mrs Wood's estate). Third party debt orders were introduced, as from 25th March 2002, by way of CPR Part 72, and have replaced the method of enforcement formerly known as garnishee proceedings, which was regulated by RSC O.49. *McDowell v Hollister* was clear authority for the proposition that the interest of a beneficiary in a pecuniary legacy under a will could not be the subject of a garnishee order. In *Re Jennery (deceased)* the Court of Appeal had held that an order for a lump sum payment under the Inheritance (Family Provision) Act 1938 was not an order for a payment of a sum of money which would enable the court to exercise its powers under the then applicable RSC O.42. Following these authorities, Patten J held that the effect of an order under s.2 of the 1975 Act was simply to re-order the provisions of the deceased's will and not to make anything equivalent to an order for payment of money that could properly be described as a debt under r.72.2.

Cases

Holloway v Musa EWCA (Civ) 335

Re Nobbs, Midland Bank Trust Co v Nobbs and ors., [2008] WTLR 905, CA (decided 9th June 1980).

Lansforsakringar Bank AB v Wood and ors [2007] EWHC 2419. The neutral citation of the earlier 1975 Act proceedings is [2006] EWHC 929 (Ch).

McDowell v Hollister [1855] 25 LT 185

Re Jennery (deceased) [1967] Ch 280 CA

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