

background law

Section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 reads as follows.

Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.

Provided that this subsection shall not apply to causes of action for defamation

The decision in *Unger v Ul-Hasan* [2023] UKSC 22, handed down on 28 June 2023, is a valuable reminder that, with few exceptions, this provision does not apply on the death of either of the spouses in litigation about financial relief on divorce etc.

The case is about an overseas divorce recognised as valid in England. The husband obtained a divorce in Pakistan and the wife applied under the Matrimonial and Family Proceedings Act 1984, s12, for financial relief under the Matrimonial Causes Act 1973. The husband died before the final determination of the application. The High Court in these proceedings, [2021] EWHC 1791 (Fam), dismissed her claim but gave her leave to appeal directly to the Supreme Court,

The first issue was whether the power of a court to order financial relief can be exercised only as between living parties to a former marriage. If the court does have the power despite the death of one of the parties, the second issue was whether a claim for financial relief is a cause of action which survives against the estate of a deceased spouse under s1(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

The SC dismissed the wife's appeal. A series of judicial decisions following the Divorce and Matrimonial Causes Act 1857 had established the "orthodox" view that matrimonial proceedings create personal rights and obligations, which end with the death of either party and are not a cause of action, preserved by the 1934 Act.

The orthodox view had developed at a time when financial relief had been regarded as discretionary and Parliament must be assumed to have enacted the 1973 Act and related legalisation in accordance with the orthodox view, whilst financial relief is now a right. The purposes of relief in the form of a pension, which originally was to provide the other party with an income, obviously, does not reflect the 2015 drawdown freedoms in the way that pension rights can be accessed.

Although the injustice of the orthodox view and the need for reform were recognised, the SC held that to allow the appeal would be a major change to long-established principles and reform is plainly for Parliament. It is not for the courts to distort the meaning of the words of the relevant statutes to achieve such a radical reform.

The SC recognised that, there is a limited exception to the general rule that the 1973 Act creates personal rights and obligations which end on death, if an applicant successfully satisfies the conditions for leave to appeal applying the principles in *Barder v Barder* [1988] AC 20 and if the appeal is allowed.

Roderick Ramage

BSc(Econ) solicitor

authorised and regulated by the Solicitors' Regulation Authority number 231800

Copenhale, Coppenhall, Stafford, ST18 9BW

01785-223030, roderick.ramage@law-office.co.uk, www.law-office.co.uk, meals.decimals.wizard

a pensions example

Section 19 of the Welfare Reform and Pensions Act 1999 enabled the courts to make pension sharing orders (PSOs), which have become the most common way that pensions are included as a part of a financial settlement in divorce etc and the termination of civil partnerships: see mainly the Matrimonial Causes Act 1973, Part II, and the Civil Partnership Act 2004 schedule 5. The effect of a PSO is that part of one party's rights in his or her pension scheme is reduced by a "pension debit" and transferred as a "pension credit" for the benefit of the other party in either the same or another pension scheme.

Regulation 6 (Discharge of liability in respect of a pension credit following the death of the person entitled to the pension credit) of Pension Sharing (Implementation and Discharge of Liability) Regulations 2000, SI 2000/1053, in sub-paragraph (1) requires the pension credit to be discharged in accordance with this regulation, and in sub-paragraph (2) requires that, if the rules or provisions of the pension arrangement so provide, the liability will be discharged by in ways including paying a lump sum or a pension or both or providing or paying for an annuity contract. Sub paragraph (4) reads as follows.

(4) Where the provisions of paragraph (2) do not apply, liability in respect of a pension credit shall be discharged by retaining the value of the pension credit in the pension arrangement from which that pension credit was derived.

A possible consequence of this is that the transferring spouse would suffer the loss the pension debit, while no one would benefit from the pension credit.

Goodyear v Goodyear [2022] EWFC 96 illustrates a solution to the sub-paragraph (4) problem. The parties had consented to an order, including a PSO in favour of the wife, but she died before the order had been implemented and the transferring scheme did not have power enabling it to discharge the pension credit in accordance with sub-paragraph (2). The husband applied to set the order aside and the wife's personal representatives opposed the application.

The parties agreed and the judge found that the effect of sub-paragraph (4) would be that neither party would benefit if the PSO were not set aside, but that if it were set aside, the pension credit would be returned to the husband.

The judge considered the test in the Barder case and was satisfied that the conditions were satisfied, so the PSO must be set aside and a new order made. On the facts of the case he ordered that the personal representatives' share be 25%, leaving the husband with 75% of his pension.

The judge held that the husband's failure to use the standard order was not fatal to his application. The standard order provides that if a party dies before the PSO is implemented, the parties will consent to the other party applying to vary or set it aside. The consent is merely to the making of the application: the Barder test must still be satisfied.

END