

Claims under the 1975 Act

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Topics Covered

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Who is eligible to claim?

Bereaved spouses and civil partners – section 1(1)(a). This can even include void marriages/civil partnerships if the claimant was in good faith – section 25.

Former spouses/civil partners – section 1(1)(b). Limited to those with no subsequent marriage or civil partnership.

Cohabitants – section 1(1)(ba). Requires 2 years of living in the same household “as if” married/civil partners. The margins are not always clear. Is it possible for the deceased to have had two separate households simultaneously?

Children – section 1(1)(c). Includes adult children.

‘Child of the family’ where deceased in role of parent – section 1(1)(d).

Other persons maintained by the deceased – section 1(1)(e). Must be substantial and does not include contributions made “for full valuable consideration pursuant to an arrangement of a commercial nature”

Who is eligible to claim?

Claims can be brought by living people only, on their own behalf and not as personal representatives of the estate of a person who was eligible to claim – *Roberts v Fresco* [2017] EWHC 283 (Ch); [2017] Ch 433.

The claim dies with the claimant – *Whyte v Ticehurst* [1986] Fam 64. What happens to the costs if the claim has already been commenced?

Time limit for claiming

- The time limit is relatively short: 6 months from the first grant of probate or letters of administration. However, the court can extend time.
- Entering a caveat against the estate to prevent a grant being readily obtained is not a proper way of buying time, but remains common.
- Applications to bring the claim after the expiry of the time limit are not akin to applications for relief from sanctions – *Cowan v Foreman* [2019] EWCA Civ 1336; [2020] 2 WLR 61.
- Standstill agreements cannot necessarily be relied on (but will surely be very relevant).
- Prior intimation of a claim, the estate not being distributed, and late discovery of important facts are all likely to be important factors.
- Even an extremely late application may succeed, as in *Thakare v Bhusate* [2020] EWHC 52 (Ch) where it was 25 years and 9 months after the expiry of the time limit.

What can be claimed?

Bereaved spouses and civil partners can seek “such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance” – section 1(2)(a) and (aa).

Other claimants can seek “such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance” – section 1(2)(b).

Maintenance is broadly and flexibly understood, but involves meeting everyday expenses – *Ilott v The Blue Cross* [2017] UKSC 17; [2018] AC 545.

The court has extremely broad powers in formulating relief to be awarded out of the estate, for example by creating trust arrangements – see section 2.

Unusually, it might even be appropriate to require the transfer of a specific property at full value – *Lewis v Warner* [2017] EWCA Civ 2182.

What can be claimed?

The court can make an interim order for provision where the claimant is “in immediate need of assistance, but it is not yet possible to determine what order (if any) should be made” and there are estate assets available for meeting the need – section 5.

Property that was held on a joint tenancy and passed by survivorship can be taken into account if “just in all the circumstances” – section 9.

Dispositions made within the 6 years prior to death that were intended to defeat claims for financial provision can be challenged – section 10.

The intention must be established, but the prevailing view is that it is not necessary to show that the deceased actually had the 1975 Act in mind. A County Court decision is cited for this: *Re Kennedy* [1980] CL 2820.

The relevant factors (general)

- The assessment is based on the facts known to the court as at the date of the hearing – section 3(5). This often means updating evidence shortly before trial is required.
- The size and nature of the net estate – section 3(1)(e). This is a controlling factor. It is very difficult to compare cases with estates of very different values.
- Financial resources and needs of the claimant(s) and any beneficiary, now or likely to be had in the foreseeable future – section 3(1)(a), (b), and (c). Financial obligations and responsibilities are included – section 3(6).
- Obligations and responsibilities of the deceased – section 3(1)(d).
- Physical or mental disabilities – section 3(1)(f).
- Any other matter the court considers relevant, including conduct – section 3(1)(g).

The relevant factors (specific)

- For claims by bereaved spouses/civil partners, the court must have regard to the provision reasonably expected on a hypothetical divorce/dissolution on the date of death – section 3(2).
- For cohabitants, the age of the claimant and length of the cohabitation must be considered, along with any contribution to the welfare of the deceased's family – section 3(2A).
- For children (and 'children of the family'), regard must be had to the duration and extent of maintenance (and whether it was in ignorance of the child's true parentage) and the liability of anyone else to provide maintenance – section 3(3).
- For other claimants maintained by the deceased, the duration and extent of the maintenance are (obviously) crucial – section 3(4).

Strategy

Claimants

Work out what you are seeking. It's desirable for negotiations, for trial, and for expectation management.

Make an offer: apply pressure, potentially gain extra benefits under Part 36.

Defendants

Should beneficiaries put financial needs in issue? Three reasons to think about not doing so: (1) privacy, (2) expense in disclosure and at trial, and (3) presentational risk.

Should the claim be resisted on grounds of bad conduct by the claimant? Probably not, unless it provides strong objective justification for disinheritance.

Make an offer: defend against the over-pitched claim.

Funding and costs

The general rule is that the unsuccessful party (or parties) pay the costs of the successful party (or parties). Do not assume that costs will come from the estate. The usual costs rules apply, including Part 36.

The costs of defending may be met by an interim distribution, provided that funds are available or the personal representatives are willing to run the risk.

Making an application for an interim order can be used as a way of funding the claimant's costs of pursuing a claim.

CFA funding is popular for claimants, but there is uncertainty about how uplifts (now not recoverable through a costs order) are to be treated. Should the court take them into account in the assessment of the claimant's financial resources and needs? The alternative is that the value of the award will be eroded. The Court of Appeal should soon decide, in the appeal against the decision in *Re H (Deceased)* [2020] EWHC 1134 (Fam).

ADR and settlement

- The effect of an order under the 1975 Act has retrospective effect for all purposes including tax – section 19(1). This applies to consent orders provided that the court considers it has jurisdiction to make the order.
- Court approval may be needed on behalf of minors.
- The formulation of offers requires care, particularly for a Part 36 offer to be made that is effective. It is critical to be able to compare the offer with the outcome and also to be able to say that the offeree could realistically have accepted. Bear in mind that an award is enforced in the same way as a legacy – *Re Jennery* [1967] Ch 280.
- The court can direct that there be Early Neutral Evaluation without the consent of the parties – *Lomax v Lomax* [2019] EWCA Civ 1467; [2019] 1 WLR 6527. A good thing?
- If mediation is made compulsory, 1975 Act claims are likely to be first among the suggested categories of case.

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