

# Private Client Webinar

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# Consequences of Cohabitation and Divorce – Till Death do us Part?



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## TOPICS

- Emma Loizou: “Cohabitees and Death”  
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- Daniel Burton: “Divorce vs Death”  
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# Cohabitees and Death

# Cohabitees

- Section 1(1)(ba) and (1A) of the 1975 Act
  - During whole period of two years ending immediately before deceased died, applicant was living
    - In the same household as the deceased
    - And as if they were a married couple or civil partners
- Claim for reasonable financial provision – limited to maintenance

## Living in the same household (1)

- “Household” not “House”
- *Gully v Dix* [2004] EWCA Civ 139, Ward LJ:
  - *“Thus they will be in the same household if they are tied by their relationship. The tie of that relationship may be made manifest by various elements, not simply their living under the same roof, but the public and private acknowledgment of their mutual society, and the mutual protection and support that binds them together.”*

## Living in the same household (2)

- Partners maintaining two properties
  - *Kotke v Saffarini* [2005] EWCA Civ 221, Potter LJ:
    - "whether... it could be demonstrated that, albeit retaining a separate domestic establishment in the house in which he had lived for some years, the deceased had effectively "moved" to live under the same roof as the claimant, "illness, holidays, work and other periodical absences" apart."
  - *Churchill v Roach* [2002] EWHC 3230 (Ch)

# Living as if married or in a civil partnership

- Flexible test
- *Re Watson* [1999] 1 FLR 878, Neuberger J:
  - *"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; but, when considering that question, one should not ignore the multifarious nature of marital relationships."*
- Publicly acknowledged relationship: *Baynes v Hedger* [2008] EWHC 1587 (Ch)



## Two years before death

- Can be satisfied if one of the partners is involuntarily away, e.g. illness (*Re Watson* [1999] 1 FLR 878)
- Interrupted cohabitation but relationship subsisting: *Gully v Dix* [2004] EWCA Civ 139; *Kaur v Dhaliwal* [2014] EWHC 1991 (Ch)
- Has the relationship irretrievably broken down or is it merely suspended with the interruption being temporary?

## Specific section 3 factors

- Section 3(2A)
  - Age of the applicant
  - Length of period applicant lived in the same household as the deceased as if they were a married couple or civil partners
  - Contribution made by the applicant to the welfare of the family of the deceased, including by looking after the home or caring for the family

# Dependants

- Section 1(1)(e) claim
  - Immediately before the death of the deceased, person was being maintained, either wholly or partly, by the deceased
  - Available for claimants who do not fall within the other categories
- Claim for reasonable financial provision – limited to maintenance



## Being maintained by the deceased

- Section 1(3): A person is to be treated as being maintained by the deceased (either wholly or partly, as the case may be) only if:
  - the deceased was making a substantial contribution in money or money's worth
  - towards the reasonable needs of that person
  - other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature

## Specific section 3 factors

- Section 3(3)
  - whether the deceased maintained the applicant and, if so, to the length of time for which and basis on which the deceased did so, and to the extent of the contribution made by way of maintenance
  - whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant

Divorce  
vs  
Death



## Divorce vs Death

- What happens when divorce settlements clash with claims for reasonable financial provision?
- *Sismey v Salandron* [2022] W.T.L.R. 281 (Ch.).

# The Legal Framework

- **Testamentary Freedom:** A person may contract or covenant to leave their assets by will and thus bind their estate.
- **Divorce:** A range of financial remedies are available under the Matrimonial Causes Act 1973, but do not include the power to compel a testamentary disposition, which can be achieved by consent.
- **Death:** Qualifying applicants (including spouses and children) may apply under the Inheritance (Provision for Family and Dependants) Act 1975 for reasonable financial provision out of the deceased's estate.

# The Problem

- **Consent Order:** An undertaking to the Court to execute a deed of covenant.
- **Deed of Covenant:** A covenant so as to bind personal representatives to leave by will or codicil to the applicant and the children of the marriage 100% of the net estate in defined shares.
- **Consequence 1:** Either (1) the estate is nil; or (2) in the event of non-compliance, revocation or remarriage, the estate is subject to a claim for breach of covenant, and will be nil.
- **Consequence 2:** No property from which to make an order for reasonable financial provision to qualifying applicants.



## The Solution?

- Anti-avoidance provisions in the 1975 Act.
- **Section 10:** Dispositions intended to defeat applications for financial provision.
- **Section 11:** Contracts to leave property by will.
- **Section 12:** Supplementary provisions.

# Case Study

- *Sismey v Salandron* [2022] W.T.L.R. 281
- Facts
- Decision
- Conclusions

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