

Divorce vs Death: Till death do us part?

Radcliffe Chambers Private Client Webinar

Thursday 17 November 2022 at 11:00am

A. Introduction

1. This paper concerns the relationship between financial provision in divorce settlements and financial provision upon death. It considers what happens when the two clash, as illustrated by the recent case of *Sismey v Salandron* [2022] W.T.L.R. 281 (Ch.).
2. In particular, I will consider the increasingly common practice of spouses including testamentary obligations in matrimonial finance settlements and the effect this has on later claims under the Inheritance (Provision for Family and Dependents) Act 1975 post death.

B. The Legal Framework

Testamentary Freedom

3. As explained in *Williams on Wills* (11th Ed.) at 3.1 (cited with approval in in *Sismey v Salandron* (supra), at §18):

“Although a will is by its nature always revocable, yet a testator may bind himself personally as to the contents of his will and may bind his assets so that his personal representative, whether he dies testate or intestate, must give effect to such agreement at the expense of the beneficiaries under the will or intestacy. There must, however, in any such case, be a binding agreement by the testator to dispose of his property in a certain way, and this involves two certainties. It must be shown that there was an agreement in law and not a mere statement of intention or a mere representation. It must also be shown with certainty what the subject-matter of the gift by the will was to be. Further, if the agreement relates to real property it must comply with the formalities prescribed by the Law of Property (Miscellaneous Provisions) Act 1989

s 2. It can be noted that apart from contract it may be possible to base a claim against a deceased person's estate on the principles of constructive trust or proprietary estoppel.”

Divorce

4. Family practitioners will of course be familiar with the provisions of the Matrimonial Causes Act 1973, sections 21, 21A and 23-24A of which provide the Court with power to make various types of award in a claim by a spouse for financial provision for that spouse and/or on behalf of the children of family following a divorce. These are:
 - 4.1. Periodical payments, including with security.
 - 4.2. Lump sum payment.
 - 4.3. Property adjustment order.
 - 4.4. A pension-sharing order.
 - 4.5. Variation of a nuptial settlement, including one made by will or codicil.
5. Crucially, the Family Courts do not have the power to direct that a spouse enter into a testamentary arrangement (viz. execute a will or codicil leaving property to a former spouse or children of the family) as part of the suite of financial remedies available.
6. The Family Courts, quite reasonably, insist that parties to financial remedy proceedings engage in ADR, and the vast majority of applications are concluded by way of consent order. Nevertheless, any consent order ought to be properly scrutinised by the Judge before being approved, as explained by Thorpe J in *Peacock v Peacock* [1991] 1 FLR 324 at 328:

“It is beyond question that such orders are not made simply upon evidence of the applicant’s consent. The court has an overriding duty to survey the sufficiency of the proposed consideration and the overall fairness of the orders proposed.”

Death

7. Private client practitioners will of course be familiar with the Inheritance (Provision for Family and Dependants) Act 1975 (the “1975 Act”), which permits a qualifying person to make an application for financial provision from the deceased’s estate on the basis that the devolution of the estate is not so as to make reasonable financial provision for the applicant.
8. Specifically:
 - 8.1. Spouses, former spouses, children, children of the family, persons being maintained and cohabiting partners may apply under section 1.
 - 8.2. The Court has very wide powers under section 2 to make orders if it considers that the will or intestacy does not make reasonable financial provision for the applicant.
 - 8.3. The Court must have regard to a range of factors in section 3 in deciding whether or not to make an order, which include the financial resources of the applicant and the beneficiaries, obligations and responsibilities of the deceased, the size and nature of the estate, disabilities and any other matter.
 - 8.4. Generally, spousal claims are subject to a higher standard (viz. a fictional divorce) than other claims, where financial provision is such as would be reasonable in all the circumstances of the case for the applicant to receive for their maintenance.

C. The Problem

9. The problem is caused by the manner in which claims for financial provision under the Matrimonial Causes Act 1973 are increasingly being compromised.
10. Specifically:
 - 10.1. As part of a suite of relief, the respondent spouse provides an undertaking to the Court to execute a deed of covenant in the form appended to the order.
 - 10.2. The deed of covenant requires the respondent to leave by will or codicil their entire estate to the former spouse and/or the children of the family in defined shares.
11. The threat of the undertaking ensures that the deed of covenant is executed, and once the deed of covenant is executed, the following applies:
 - 11.1. The covenantor is obliged to ensure that upon their death there is a will or codicil bequeathing to the spouse and/or children of the family the estate in the agreed shares.
 - 11.2. If the obligation has been complied with, then the covenantor's estate is nil.
 - 11.3. If the obligation has not been complied with, then there lies an action against the personal representatives of the estate for specific performance or damages or otherwise that the property is held on trust, see *Schaefer v Schuhmann* [1972] AC 572 (PC) at 587C.
12. The problem arises when the covenantor subsequently enters into another marriage and/or has children or enters into any of the multifarious relationships

which give rise to a right to apply for reasonable financial provision upon death. Specifically, the deceased's property is already tied up by the provisions of the consent order and the deed of covenant.

13. A common factual scenario is where the covenantor complies with the consent order by executing the deed of covenant, then complies with the deed by executing a will in the terms required, but later remarries. The effect of the remarriage is to revoke the will, see section 18(1) of the Wills Act 1837.
14. Therefore, upon the covenantor's death, the estate devolves on an intestacy and the surviving spouse takes the majority interest, along with the deceased's children (whether of the first or second marriage or otherwise). However, the estate is subject to a claim by the covenantees which will effectively reduce the estate to nil, and thus the new family have no assets against which to claim.

D. The Solution?

15. It appears that the drafters of the 1975 Act considered this kind of scenario, and sought to provide a solution in the form of various anti-avoidance provisions, found in sections 10 to 12.
16. These provisions are complex, but in essence, section 10 relates to dispositions intended to defeat applications for financial provision and section 11 relates to contracts to leave property by will. Section 12 contains supplementary provisions.
17. A deed of covenant may qualify either as a disposition or a contract to leave property by will, depending on the extent of consideration provided by the parties. It is therefore necessary to consider both provisions.
18. As to section 10:

- 18.1. For the provisions to apply, the claimant in the claim must also make an application under this section, see 10(1).
 - 18.2. The Court must be satisfied that three conditions are made out, as per section 10(2):
 - “(a) That, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition, and
 - (b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as “the donee”) or by any other person, and
 - (c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act”
 - 18.3. If so, then the Court may order the donee to provide such sum of money or property as it so chooses, but that property must not exceed the sum or value received, see section 10(2) to (4).
 - 18.4. However, the donee may also apply to bring into consideration other dispositions made by the Deceased which meet the test and the Court will have the power to include that property in any award, see section 10(5).
 - 18.5. In exercising its powers to make an award, the Court shall have regard to the circumstances in which any disposition was made and any valuable consideration which was given, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case, see section 10(7).
19. Section 11 is drafted in similar, but not identical terms. Specifically:

19.1. The conditions required to be satisfied are that, at section 11(2):

“(a) that the deceased made a contract by which he agreed to leave by his will a sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate, and

(b) that the deceased made that contract with the intention of defeating an application for financial provision under this Act, and

(c) that when the contract was made full valuable consideration for that contract was not given or promised by the person with whom or for the benefit of whom the contract was made (in this section referred to as “the donee”) or by any other person, and

(d) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act”

19.2. If satisfied, then the Court may make an order directing the money or property provided to be used or otherwise direct that the contractual obligation is not to be performed, thereby keeping the property in the estate, see section 11(2).

19.3. Importantly, the Court may exercise its power only to the extent that it considers that the amount of any sum of money paid or to be paid or the value of any property transferred or to be transferred in accordance with the contract exceeds the value of any valuable consideration given or to be given for that contract, and for this purpose the court shall have regard to the value of property at the date of the hearing, see section 11(3).

20. The supplementary provisions in section 12 provide that:

20.1. The intention condition is fulfilled if the Court is of the opinion that, on a balance of probabilities, the intention of the deceased (though not necessarily his sole intention) in making the disposition or contract was

to prevent an order for financial provision being made or to reduce the amount of the provision which might otherwise be granted by an order thereunder, see section 12(1).

20.2. Where no valuable consideration was given by any person for a contract, it shall be presumed, unless the contrary is shown, that the deceased made that contract with the intention of defeating an application for financial provision, see section 12(2).

20.3. The Court can give such consequential directions as it thinks fit (including directions requiring the making of any payment or the transfer of any property) for giving effect to the order or for securing a fair adjustment of the rights of the persons affected thereby, see section 12(3).

20.4. Any order or direction shall apply to the personal representatives of the donee, but the Court shall not have power to make an order in respect of any property forming part of the estate of the donee which has been distributed by the personal representative (who shall not be liable for making distributions before notice of the application), see section 12(4).

E. Case Study: Sismey v Salandron

21. Until recently, the anti-avoidance provisions have received very little, if any, judicial consideration. The decision in *Sismey v Salandron* [2022] W.T.L.R. 281 (Ch.) changed that, and we now have the first reported example of the Court grappling with the problem caused when divorce clashes with death.

Facts

22. In summary:

- 22.1. The Court had to determine claims concerning the estate of the deceased (S) by his second wife (M) and his adult son (T) from his first marriage.
- 22.2. T's parents were married in 1988. The family home had been a residential property. S worked overseas during the early 2000s, where he formed a relationship with M who lived in the Philippines. T's parents separated, and T moved with his mother to a house that she had acquired with inheritance monies. S remained living in the property when in the UK. He and M had a child (J) in 2008.
- 22.3. In 2012, M and J's immigration status was finally resolved, and they moved to the UK to live in the property with S. To satisfy the UK border agency that he was obtaining a divorce from his first wife, S obtained a decree nisi in 2013. Negotiations with his first wife concerning the financial remedy proceedings concluded in an agreement in 2016 which was embodied in a consent order that the Family Court subsequently approved.
- 22.4. In accordance with the terms of that order, S executed a deed of covenant in February 2017 and gifted the property to T by his will of March 2017. M had signed a statement on the consent order to the effect that she understood its terms and had no beneficial interest in the property. In 2019, S was diagnosed with terminal cancer. He married M. The marriage revoked the will and S died intestate. The property formed the significant part of his estate.
- 22.5. T sought specific performance of the agreement within the deed to leave the property to him, and/or a declaration that a constructive trust had arisen. M asserted that the deed was unenforceable because it failed to comply with section 2 of the Law of Property (Miscellaneous

Provisions) Act 1989 (the “1989 Act”). Alternatively, she sought an order for financial provision under the 1975 Act.

Decision

23. In a 40-page written judgment, HHJ Kelly considered the evidence and the legal framework and made the following findings:

23.1. **Enforceability of deed of covenant:** The deed was expressly enforceable by T and, construed with the consent order, constituted sufficient consideration so as to be enforceable for the purposes of section 2(2) of the 1989 Act. As such, it was valid and enforceable against the personal representatives of S’s estate and M was required to satisfy the test in section 11 of the 1975 Act.

23.2. **Constructive trust:** Had the deed not been valid and enforceable, then a common-intention constructive trust arose on the basis that S’s first wife had relied on the agreement to her detriment and it would be unconscionable of S’s personal representatives to deny T’s interest in the property. In that case, M was required to satisfy the test in section 10 of the 1975 Act.

23.3. **Intention to defeat a claim:** Looking at the contemporaneous correspondence, it was a material intention of S to defeat any future application for financial provision or reduce the amount of provision which might be granted, such that the first limb under section 11(2) of the 1975 Act was made out.

23.4. **Full and valuable consideration:** M had failed to establish that S’s first wife had not provided full and valuable consideration by entering into the consent order in circumstances where the terms of the consent order were very favourable to S, allowing him to retain his pension in

full and keep more of a matrimonial mortgage-free property and all his savings, bar a share of a joint account. As such, the claim under the 1975 Act failed.

F. Conclusion

24. The judgement in *Sismey v Salandron* (supra) illustrates that the questions of detriment, unconscionability, intention and consideration are factually sensitive and will depend on the scrutiny of the evidence by the Court.
25. The anti-avoidance mechanisms in the 1975 Act provide in theory a mechanism to claim against assets apparently tied up in far-reaching consent orders from an earlier divorce. In practice, however, there is a high threshold, and an applicant will need to show not only the requisite intention but also that there has been a significant over-settlement in favour of the respondent or otherwise that there was a “sham divorce”.
26. It is submitted that the evidence in most cases will not reach this threshold, and so, for the time being at least, it appears that divorce trumps death.

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