

Finances: bringing a claim post-death

It is a long established principle of English law that a person can dispose of their assets as they see fit. However, the Inheritance (Provision for Family and Dependants) Act 1975 (“the Act”) has impacted on this freedom. Certain categories of people, including spouses and civil partners, can make an application under the Act if the disposition of the deceased's estate is not such as to make reasonable financial provision for them.

The issue of domicile

The Act only applies where the deceased was domiciled in England and Wales at the date of his death. A person is regarded as domiciled in the jurisdiction that is considered to be their permanent home. Everyone acquires a domicile of origin at birth, usually the domicile of the individual's father at that time. Once an individual attains the age of 16, they are free to acquire a domicile of choice by becoming resident in another jurisdiction and showing an intention to permanently or indefinitely remain there.

Who can bring a claim under the Act?

The following categories of people can make an application for financial provision under the Act.

- The spouse or registered civil partner of the deceased;
- A former spouse or former civil partner of the deceased (who has not remarried, formed a subsequent civil partnership or been specifically barred from bringing a claim under the Act by way of a court order e.g. by way of a court order);
- A cohabitant of the deceased who lived with the deceased for the whole of the two year period prior to their death as the spouse or civil partner of the deceased;
- A child of the deceased. The term ‘child’ includes an illegitimate child, a child conceived but not born at the time of death, an adult child and an adopted child;
- Any person who, in the case of any marriage or civil partnership to which the deceased was at any time a party, was treated by the deceased as a child of the family;
- Any other person maintained by the deceased. The person will be treated as having been maintained if the deceased was, other than for full consideration, making a substantial contribution in money or money's worth towards their reasonable needs. A claimant under this category will need to establish that:
 - a) the contribution made by the deceased was for the maintenance of the claimant and to provide for his reasonable needs;
 - b) the contribution was substantial;
 - c) the payments were made immediately before the death of the deceased;
 - d) the payments were made otherwise than for full valuable consideration; and
 - e) the deceased assumed responsibility for the claimant.

The nature, extent and purpose of the payments and the length of time over which they were paid will all be considered by the court.

Time limits

A claim under the Act must be brought within six months from the date on which probate or letters of administration are granted. The court does have discretion to admit a claim after this time but the claimant must be able to show they have an arguable case and that there were special circumstances preventing a timely application. For example, the claimant may have been involved in negotiations with the estate which broke down after the six month period expired.

Reasonable financial provision

Once a claimant has established that they are entitled to bring a claim, the key issue is whether the deceased made reasonable financial provision for them and, if not, what a court would consider to be reasonable financial provision in all of the circumstances.

The standards

There are two standards by which reasonable financial provision is measured. The Act defines reasonable financial provision for a spouse or registered civil partner as “such financial provision as it would be reasonable in all the circumstances of the case to receive, whether or not that provision is required for their maintenance” (“**the surviving spouse standard**”).

In respect of a claimant other than a spouse or registered civil partner, “reasonable financial provision” means such provision as it would have been reasonable in all the circumstances of the case for the claimant to receive *for his maintenance*. (“**the maintenance standard**”).

Provision for a spouse / registered civil partner

The Act makes it clear that in the case of a surviving spouse or civil partner, the primary criterion is what the court considers “reasonable” provision. Maintenance may be relevant but it should not be the dominating criterion. The court will also consider the standard of living enjoyed by the claimant prior to the deceased’s death.

There are two exceptions to the rules surrounding provision for a spouse or civil partner:

- First, where the marriage is subject to a decree of judicial separation and at the date of death the decree is in force and the separation continuing the court has power, if it thinks it just, to treat the application as if the decree had not been granted.
- In the case of civil partners who are subject to a separation order, the maintenance standard will apply.
- Secondly, where a former spouse’s or former civil partner’s application for financial relief in respect of matrimonial or civil partnership proceedings has not been made or is still pending, the court may treat such a claimant as if there had not been a decree of divorce, nullity or judicial separation (or dissolution, nullity or separation order) provided such decree or order was pronounced within twelve months of the deceased’s death.

Provision for other claimants

The Act does not define the term “maintenance” although case law provides guidance on this point. Maintenance is taken to include payments which directly or indirectly enable the claimant to discharge his cost of living in the future. This is no more and no less than the claimant’s and his family’s way of life and well-being, health and financial security.

Relevant factors which the court must consider

Once the court has considered the issues outlined above, it must have regard to the factors set out in section 3 of the Act.

General factors

(i) Financial resources and needs

The court must consider the present and future financial resources and needs of the claimant and any beneficiaries. The following should be disclosed to the court:

- details of the parties’ present and future resources;
- information relating to the parties’ earning capacity;
- earnings from investments, state benefits and pension rights;

- valuations of capital assets including real property, savings, shareholdings and other valuable items;
- any entitlement under an insurance policy, including the surrender value and maturity value;
- information relating to the parties' future prospects;
- the needs of those for whom the claimant or beneficiary is responsible (for example, children or an adult disabled child);
- any other liability of the claimant or beneficiary; and
- where a claimant, beneficiary or their dependant suffers from ill-health, medical evidence detailing the present condition and prognosis.

Form E, which is used in matrimonial proceedings, provides a useful template for the information required.

(ii) Deceased's obligations and responsibilities

The court will consider whether the deceased had any obligations and responsibilities towards any applicant or beneficiary. The obligations and responsibilities must have existed immediately prior to their death. An adult child of the deceased cannot rely solely on the usual obligations and responsibilities pertaining to the parent/child relationship and will generally have to show special circumstances. An adult child is not entitled to make a claim on the basis that the deceased failed to provide for them during their minority.

The deceased may be found subject to a moral obligation where there is evidence that they:

- made promises to the claimant or indicated that they owed the claimant an obligation;
- took advantage of the claimant's services; and
- behaved in such a way towards the claimant as to indicate an obligation.

(iii) The nature and size of the estate

The smaller the estate, the more difficult it will be to satisfy competing claims. Difficulties may also arise where it is not possible to realise an asset for its full value or any value at all. For example, the matrimonial home may be required to provide a home for a child of the deceased.

(iv) Any physical or mental disability of the claimant or any beneficiary

The court should be provided with evidence of the disabled person's medical condition, prognosis and costs of care.

(v) Any other relevant matter

The court may take into consideration any other matter, including the conduct of the claimant and any other person, which it believes to be relevant. This may relate to the deceased's reasons for disposing of his estate as he did, his wishes in respect of certain assets and the existence of mutual wills. The court is not obliged to follow the deceased's wishes.

In addition to the general factors which apply to all claims, there are a number of specific factors relevant to the different categories of claimant.

Specific factors

(i) Surviving spouse / civil partner

The following factors will be taken into account:

- the age of the claimant and their responsibility for any minor children, particularly when considering their earning capacity and ability to retrain;
- the claimant's contribution to the welfare of the family;
- the length of the marriage and any periods of separation; and
- what the claimant might have expected to receive if, at the date of death, the marriage had been terminated by divorce or the civil partnership by a dissolution. This concept of a "notional divorce" requires a consideration of matrimonial law.

The landmark decisions of the House of Lords in the matrimonial finance cases of *White v White*, *Miller v Miller and McFarlane v McFarlane* have impacted on the "notional divorce" factor which the court will consider in relation to a spouse's or civil partner's claim under the Act. *White* established the principle of a "yardstick of equality". *Miller and McFarlane* built on *White* and held that the concept of equality is comprised of three strands:

- financial needs;
- compensation – this addresses any relationship generated disadvantage and future economic disparity (for example career sacrifice); and
- a right to share – both parties are entitled to share the fruits of their partnership. The yardstick of equality should be applied to all property acquired during the marriage otherwise than by gift or inheritance.

Whilst the concept of equality should be applied universally, there was a recognition that many cases will be confined to a consideration of needs due to insufficient assets.

In *Fielden v Cunliffe*, the court held that the objective should be to achieve an outcome which is fair and non-discriminatory. A way of assessing whether that outcome has been achieved is to cross check the proposed result against the yardstick of equality. Any departure from the principle of equality should only be undertaken with good reason.

In *Miller and McFarlane*, a distinction was drawn between matrimonial and non-matrimonial assets although varying definitions were put forward by the Law Lords. Matrimonial property can be described as the financial product of the parties' common endeavour and will usually include the matrimonial home. Non-matrimonial property is an unmatched contribution brought into the marriage by one party.

The differing origins of the property may justify a departure from equality. For example, where the marriage is short and there is substantial non-matrimonial property belonging to one spouse / civil partner, the court may be justified in denying the other spouse / civil partner an equal share. The relevance of the source of assets will diminish in the context of longer marriages.

Only in exceptional circumstances will the courts identify a "stellar contribution" by one party. For example, in *Charman v Charman* the matrimonial assets were valued at £131 million, much of which resulted from the husband's generation of wealth. The husband retained 63% of the assets to reflect his extraordinary contribution. In the vast majority of cases, the court will treat the spouses' / civil partners' contributions as equal.

(ii) Former spouse, former civil partner or co-habitant

Save for the deemed marriage issue (set out above), the factors to which a court will have regard are the same as for a surviving spouse or civil partner. Case law has suggested that the following matters are also relevant:

- the existence of a clean break settlement;
- any relationship between the deceased and the former spouse / civil partner since divorce / dissolution which could give rise to a moral obligation to provide;
- special or exceptional circumstances;
- the time which has elapsed since the parties separated and since the final settlement; and
- evidence to suggest full and frank disclosure was not made.

(iii) A child

The court will consider the manner in which the claimant was being, or in which he might have expected to be, educated or trained.

(iv) A person treated as a child of the family

In addition to (iii) above, the court will consider whether the deceased had assumed any responsibility for maintaining the claimant, the length of time for which such responsibility was discharged and whether the deceased knew, in assuming that responsibility, that the claimant was not his own child. The liability of any other person to maintain the claimant will be relevant.

(v) Any other person being maintained by the deceased

The court will consider the extent to which, and the basis upon which, the deceased assumed responsibility for the maintenance of the claimant, and the length of time for which they discharged that responsibility.

Powers of the Court

If the court is satisfied that the deceased's Will or the law of intestacy does not make reasonable financial provision for the claimant, it has the power to order periodical payments, payment of a lump sum, the transfer of property, settlement of property on trust for the benefit of the claimant or variation of a post-nuptial settlement.

Conclusion

Many people mistakenly assume that a person's Will or how their estate is to pass under the intestacy rules is definitive. However, the Inheritance (Provision for Family and Dependents) Act 1975 has significantly impacted upon an individual's freedom to bequeath their property as they wish. If the court is satisfied that reasonable financial provision has not been made for a claimant by the deceased, it will consider a number of factors, both general and category specific, before deciding whether that person should receive something additional from the estate. In reaching its decision, the court has a wide discretion to take many factors into account, and this can make an accurate prediction of the outcome rather difficult.