Trinity Term
[2023] UKSC 22
On appeal from: [2021] EWHC 1791 (Fam)

JUDGMENT

Unger and another (in substitution for Hasan) (Appellants) *v* Ul-Hasan (deceased) and another (Respondents)

before

Lord Hodge, Deputy President
Lord Hamblen
Lord Leggatt
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
28 June 2023

Heard on 20 October 2022

Appellant
Michael Horton KC
Greg Williams
Srishti Suresh
(Instructed by Dawson Cornwell)

Respondent
Tim Amos KC
Andrzej Bojarski
Joe Rainer
(Instructed by Expatriate Law (London))

LORD STEPHENS (with whom Lord Hodge, Lord Hamblen and Lord Burrows agree):

1. Introduction

1. The first issue in this appeal is whether on the true construction of the Matrimonial and Family Proceedings Act 1984 ("the 1984 Act") read with the Matrimonial Causes Act 1973 ("the 1973 Act"), the power of a court in England and Wales to order financial relief after an overseas divorce can only be exercised as between living parties to a former marriage. If the court does have the power to order financial relief despite the death of one of the parties to the marriage, then the second issue is whether a claim for financial relief under the 1984 Act is a cause of action which survives against the estate of a deceased spouse under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act").

2. This appeal concerns a wife's application under section 12(1) of the 1984 Act for financial relief in England and Wales after an overseas divorce in Pakistan. On such an application, under Part III and pursuant to section 17 of the 1984 Act, the court may make any one or more of the orders which it could make under Part II of the 1973 Act if a decree of divorce in respect of the marriage had been granted in England and Wales. That means the court is able to make orders including any of the financial provision orders mentioned in section 23(1) of the 1973 Act or any of the property adjustment orders mentioned in section 24(1) of the 1973 Act.

3. The issue in this appeal arises because on 18 January 2021, some three weeks prior to the final hearing to determine the Wife's application, the Husband, then aged 81 and domiciled in Pakistan, died in Dubai. The Wife seeks to proceed with her application against the Husband's estate. On behalf of the Husband's estate, it is said that the Wife's rights under the 1984 Act are personal rights which only enable orders to be made as between living parties to a former marriage. Accordingly, the Wife's right to enforce the personal obligations of the Husband ended with his death and cannot be pursued against his estate. Accordingly, the issue in this appeal is whether, where one of the parties to an application under Part III of the 1984 Act for financial relief has died, further proceedings can or cannot be taken.

4. Mostyn J in giving a magisterial and potentially seminal judgment, [2021] EWHC 1791 (Fam); [2022] Fam 1, stated at para 53 that he was convinced that the Wife's unadjudicated claim for financial relief against the Husband was a cause of action vested in her and subsisting against him such that on the Husband's death the Wife's claim survived against his estate under section 1(1) of the 1934 Act. Section 1(1), as amended and in so far as relevant provides:

> "(1) …, 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."

5. On the basis that the Wife's claim survived her Husband's death under section 1(1) of the 1934 Act, the judge considered that, unless he was constrained by authority, the Wife's unadjudicated Part III claim under the 1984 Act could be continued against the Husband's estate. However, the judge decided, at para 23, that he was bound by the Court of Appeal decision in *Sugden v Sugden* [1957] P 120 and therefore he was obliged to find that the Wife's claim for financial relief expired with the death of the Husband even though he considered the decision in *Sugden* was wrong. Accordingly, he was compelled to, and did, dismiss the Wife's application for financial relief. The judge also considered that the Court of Appeal would be bound by the decision in *Sugden* such that it was appropriate to grant a certificate under section 12(1) of the Administration of Justice Act 1969 enabling an application to be made to this court for leave to appeal directly from the High Court to the Supreme Court.

6. On 12 April 2022, the Supreme Court granted permission to appeal directly from the High Court to this court.

2. Changing family law principles relating to property and the legal recognition of relationships together with the terminology used in this judgment

7. Before addressing the issues in this appeal, it is appropriate to say something about the evolution of principles in relation to matrimonial property and as to the changes which have occurred in relation to the recognition of different family relationships between individuals.

8. The principles underpinning how the property of the parties to a marriage should be divided on divorce are a world apart from those which applied historically. In 1857, when the Divorce Court was established, a woman could not even own her own property: on marriage everything she owned (apart from household goods) became her husband's. Pending divorce or after divorce, the power of the court was restricted to ordering a husband to pay maintenance to his wife. Currently, the power of the court to order financial relief on divorce is contained in the 1973 Act. That Act confers on the court wide discretionary powers over all the property of the parties to a marriage in order to achieve an outcome as fair as possible in all the circumstances. However, the discretionary nature of the power does not mean a party to a marriage is

not entitled to demand an outcome as of right. A claim for financial relief under the 1973 Act does not amount to a mere hope depending on the contingency that discretion will be exercised in the claimant's favour. Rather the judicial discretion is guided by the principle that a former spouse or a civil partner is *entitled* to a fair outcome. As Lord Nicholls of Birkenhead stated in *Miller v Miller* [2006] 2 AC 618 at para 9, "[each] party to a marriage is *entitled* to a *fair* share of the available property" (emphasis in original). Thorpe LJ in *Hill v Haines* [2008] Ch 412, para 57 stated that a spouse "in bringing her claim for ancillary relief does not come as a suppliant but as one seeking the quantification of her entitlement". Munby LJ in *Richardson v Richardson* [2011] EWCA Civ 79 at para 19 identified the wife as having "earned her share" so that she "was *entitled* to have that recognised by the Family Division" (emphasis added). It is no longer appropriate to state, as Denning LJ stated in *Sugden v Sugden* at page 135, that "[in the Divorce Court] there is no right to maintenance, …, or to a secured provision, or the like, until the court makes an order directing it". It is also no longer appropriate to question, as Ormrod J did in *D'Este v D'Este* [1973] Fam 55 at page 59, whether the rights created by matrimonial causes legislation are "rightly called 'rights'…".

9. How individuals choose to obtain legal recognition of their relationships has also changed significantly since 1857. The Civil Partnership Act 2004 created the concept of a civil partnership, which was extended to opposite sex couples following the decision of this court in *R (Steinfield) v Secretary of State for International Development* [2018] UKSC 32, [2020] AC 1 and subsequent amendments to the Civil Partnership Act 2004. Both same-sex and opposite-sex couples are now permitted to marry. As this case concerns a husband and a wife, those terms are used in this judgment although applications for financial relief under the 1973 Act will not always concern a husband, or indeed a wife.

3. Factual background

10. A summary of the factual background is that Nafisa Hasan ("the Wife") married Mahmud Ul-Hasan ("the Husband") in Pakistan on 4 September 1981. They went on to have a long marriage. There is one child of their marriage, Iman Hasan, and another child of the Wife who was treated as a child of the family, Adeela Unger, née Qureshi. Richard Sebastian Francis de Unger is married to Adeela Unger.

11. The Wife said that the Husband generated significant wealth during the marriage. This wealth included a property in London, bought in 1998 to be a home for the parties and a base for their children.

12. The Wife and the Husband separated in 2006 and the Husband obtained a divorce in Pakistan on 10 January 2012.

13. On 28 March 2014, the Husband married Lamya Al Shaibah, with whom he subsequently had two children.

14. The marriage between the Husband and the Wife having been dissolved by means of judicial proceedings in an overseas country and the divorce being recognised as valid in England and Wales, the Wife sought, and on 1 August 2017 was given, leave by Recorder Roberts under section 13(1) of the 1984 Act to apply for an order for financial relief in England and Wales under Part III of that Act. On 11 August 2017, the Wife made that application. In these proceedings and prior to the death of the Husband, Lamya Al Shaibah acted as his litigation friend as he had been diagnosed with dementia.

15. The Husband's 'Form E' Financial Statement, dated 29 December 2019, declared capital of £7 million. The Wife said that she believed the scale of the Husband's wealth was enormous and far in excess of that which he had disclosed. There followed several interlocutory hearings, principally about the Husband's disclosure, and there was delay because of the Covid 19 pandemic. The Wife's application was listed for final hearing on 8 February 2021. However, on 18 January 2021 the Husband died in Dubai, domiciled in Pakistan. Lamya Al Shaibah, the Husband's surviving widow and former litigation friend, was appointed as executor of the Husband's estate.

16. As the Husband did not die domiciled in England and Wales, it was not open to the Wife to apply to the court under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act") on the ground that the disposition of the Husband's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, was not such as to make reasonable financial provision for her; see section 1. Accordingly, the only route for the Wife to obtain financial relief in England and Wales was pursuant to the unadjudicated Part III claim under the 1984 Act. That route would only be open to her if her claim survived the death of the Husband and could be continued against his estate under section 1(1) of the 1934 Act.

17. On 2 July 2021, the judge dismissed the Wife's application, holding that he was required by Court of Appeal authority to find that the Wife's claim for financial relief expired with the death of the Husband.

18. On 12 April 2022, the Wife was given leave to appeal from the High Court directly to this court. Prior to the hearing of the appeal in this court, and on 5 May 2022, the Wife died.

19. On 20 June 2022, the Wife's daughter and Adeela's husband, Richard Sebastian Francis de Unger, as personal representatives of the Wife's estate, applied to be substituted as appellants in this appeal. This application was granted on 21 July 2022.

20. As both the Husband and the Wife have died since the Wife made her Part III application, the appeal has been continued by the personal representatives of the Wife's estate, as appellants, against Lamya Al Shaibah, the executor of the Husband's estate, as the second respondent.

4. The proper approach to the central issue on this appeal

21. The judge at para 3 of his judgment defined the "core question" as being "whether the unadjudicated claim by the [Wife] under Part III [of the 1984 Act] survives the death of the [Husband] and can be continued against his estate".

22. The parties to this appeal agreed, I consider correctly, that the proper approach to such a question was set out by the House of Lords in *Barder v Barder* [1988] AC 20 (also known as *Barder v Caluori*, henceforth "*Barder*"). In that case, in proceedings for divorce in England and Wales, the wife was awarded what was then known as care and control of the two children. An order was made by the registrar by consent providing, amongst other things, that the husband should within 28 days transfer to the wife his legal and equitable interest in the matrimonial home. After the time limit for appealing against the order had expired, but before it had been executed, the wife killed the children and committed suicide. The husband applied for leave to appeal out of time against the consent order. When making that application the husband asserted that the consent order had been based on the fundamental assumption that the wife and children would for a substantial period require a suitable home and this assumption had been totally invalidated by the supervening event of their deaths. However, Jacqueline Caluori, as personal representative of the wife's estate, contended that the wife's death had caused the suit to abate with the effect that there could be no further proceedings by way of appeal against the consent order, which in turn meant that there was no jurisdiction to entertain the husband's application for leave to appeal out of time. Jacqueline Caluori also contended that following the wife's death the court's only remaining jurisdiction was in relation to an application to enforce the registrar's consent order.

23. The speech of Lord Brandon of Oakbrook, with which the other members of the House agreed, extensively reviewed the authorities in relation to the doctrine of abatement of a divorce suit by the death of one of the parties to it. He then proceeded to identify, at page 37 D- F, three conclusions from those authorities.

24. The first conclusion was:

> "… there is no general rule that, where one of the parties to a divorce suit has died, the suit abates, so that no further proceedings can be taken in it. The passage in the judgment of Shearman J in *Maconochie v Maconochie* [1916] P 326, 328, in which he stated that such a general rule existed, cannot be supported."

In support of that conclusion Lord Brandon referred, at pages 36 B to 37 D, to five cases in which it was held that further proceedings in a divorce suit could be taken after one of the parties to it had died.

25. The second conclusion was:

> "… it is unhelpful, in cases of the kind under discussion, to refer to abatement at all. The real question in such cases is whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken."

26. The third conclusion was:

> "… the answer to that question, when it arises, depends in all cases on two matters and in some cases also on a third. The first matter is the nature of the further proceedings sought to be taken. The second matter is the true construction of the relevant statutory provision or provisions, or of a particular order made under them, or both. The third matter is the applicability of section 1(1) of [the 1934 Act]."

27. Applying that approach, Lord Brandon identified the nature of the further proceedings sought by the husband to be taken as being an appeal out of time to a judge of a divorce county court against an order made in a divorce suit by a registrar of

that court. He also identified the relevant provisions in relation to such an application as being rule 124(1) of the Matrimonial Causes Rules 1977, made under section 50 of the 1973 Act. The right given by the rule is therefore in effect a statutory right together with Order 13, r 4(1) and (2) of the County Court Rules 1981 (as made applicable by rule 3(1) of the Matrimonial Causes Rules 1977). Lord Brandon concluded that on the true construction of rule 124(1) and Order 13, r 4(1), the jurisdiction of a judge to entertain an appeal out of time by one party to a divorce suit against an order or decision made or given by a registrar did not lapse on the death of the other party to the suit. Accordingly, there was jurisdiction to entertain an appeal out of time by the husband against the registrar's order notwithstanding the death of the wife. Given that there was jurisdiction on the true construction of those provisions, it was not necessary for Lord Brandon to consider, and he did not consider, the question of whether there was a cause of action within section 1(1) of the 1934 Act. This was the third matter that Lord Brandon had stated might arise in answering the question whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken.

28. I consider that that sequence of questions and matters to be considered, as set out by Lord Brandon, remains the correct sequence in relation to matrimonial legislation such as the 1984 Act and 1973 Act.

5. Identification of the appropriate questions in this appeal applying the approach in *Barder*

29. Lord Brandon's first conclusion was that there is no general rule that where one of the parties to a divorce suit has died, the suit abates with the consequence that no further proceedings can be taken in it.

30. Applying Lord Brandon's second conclusion to the facts of this appeal leads to the conclusion that the real question on this appeal is whether, where one of the parties to an application under Part III of the 1984 Act for financial relief has died, further proceedings can or cannot be taken ("the question").

31. In answering the question, the first matter is to identify the nature of the further proceedings sought to be taken. On this appeal there is no dispute that the nature of the further proceedings is the continuation of the claim for financial relief under section 17 of the 1984 Act, which involves consideration of whether to make any one or more of the orders available to a court under Part II of the 1973 Act, including any of the financial provision orders mentioned in section 23(1) of the 1973 Act or any of the property adjustment orders mentioned in section 24(1) of the 1973 Act.

32. In answering the question, the second matter is to determine whether on the true construction of the relevant statutory provision or provisions further proceedings in the suit can or cannot be taken when one of the parties has died. In this appeal, the relevant statutory provisions are contained in the 1984 Act and the 1973 Act. The provisions of the 1975 Act are aids to the true construction of the 1984 Act and the 1973 Act.

33. If, on their true construction, the statutory provisions in the 1984 and 1973 Acts create personal rights and obligations which can only be adjudicated between living parties, then the 1934 Act cause of action issue does not arise.

6. The judge's approach to the central issue

34. I consider that Mostyn J incorrectly went straight to the third matter identified by Lord Brandon, namely the applicability of section 1(1) of the 1934 Act. He failed to consider and to make any determination in relation to Lord Brandon's anterior second matter, namely whether, on the true construction of the relevant statutory provisions, further proceedings in the suit can or cannot be taken when one of the parties had died. On this basis, I consider that Mostyn J's analysis, excellent as it is as far as it goes, is flawed given his failure to determine the true construction of the relevant statutory provisions.

35. However, in sympathy with the judge, and in agreement with the reservations in relation to this matter expressed by Thorpe LJ at para 27 and Dyson LJ at para 51 in *Harb v King Fahd Bin Abdul Aziz* 2005 EWCA Civ 1324; [2006] 1 WLR 578, I would observe that the answer to the third matter would be relatively straightforward if, on the true construction of the statutory provisions, these are rights in respect of which further proceedings can be taken when one of the parties has died.

7. Statutory interpretation

36. In considering the words used by Parliament, which is the primary source by which meaning is ascertained, it is appropriate to consider the words used in their particular context: see *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396. The context, as in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, at para 29, may be the internal context, so that:

> "A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context."

37. However, a role in the process of statutory interpretation may also be played by the external context such as the legal, social, and historical context at the time at which the statute was passed. Furthermore, Parliament is presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions. In *R (N) v Lewisham London Borough Council* [2014] UKSC 62; [2015] AC 1259, 1304, at para 53 Lord Hodge, with whom those in the majority agreed, stated that:

> "Where Parliament re-enacts a statutory provision which has been the subject of authoritative judicial interpretation, the court will readily infer that Parliament intended the re-enacted provision to bear the meaning that case law had already established."

Furthermore, as Lord Hodge stated in *R (Project for the Registration of British Citizens)* at para 30:

> "Other sources, such as Law Commission reports, … may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2."

38. Accordingly, to arrive at the true construction of the relevant statutory provisions in this appeal, it is appropriate to consider the legal context consisting of relevant judicial decisions at the time at which the 1973 and 1984 Acts were passed, together with the legal context when the 1975 Act was passed. It is also appropriate to consider relevant Law Commission reports.

8. Judicial decisions at the time at which the 1973 and 1984 Acts were passed

39. In the appellant's written case it is accepted, in my view correctly, that "it has long been assumed, and decided by lower courts, that a claim for what used to be known as 'ancillary relief' (financial provision on divorce etc) would fall away on the death of one of the spouses". I consider that several judicial decisions since the mid-19th century have consistently construed matrimonial legislation as creating personal rights and obligations which end with the death of a party to the marriage, and cannot be pursued against the deceased's estate. Parliament is presumed to have knowledge of that established orthodox understanding when enacting the 1973, 1975, and 1984 Acts.

40. Furthermore, there are also several judicial decisions in which it has been held that the right to financial provision on divorce is not a cause of action subsisting against a deceased so that it survives against his estate under section 1(1) of the 1934 Act. However, if on the true construction of the 1984 and 1973 Acts, the rights and obligations under those Acts do not end with the death of a party to the marriage, then, as I have indicated in para 35 above, the answer to the third matter would be relatively straightforward. A party to a marriage is entitled to demand an outcome as of right, see para 8 above. I consider that these judicial decisions, insofar as they suggest that a claim for financial relief is not a cause of action within the meaning of the 1934 Act, cannot be supported.

41. It is appropriate to say something about these judicial decisions and the judicial decisions founding the established orthodox view.

42. The first is *Thomson v Thomson* [1896] P 263. The case concerned the true construction of the statutory power under section 5 of the Matrimonial Causes Act 1859 (22 & 23 Vict c 61) (as extended by section 3 of the Matrimonial Causes Act 1878 (41 & 42 Vict c 19)) to vary a marriage settlement. In that case a husband, having obtained a decree absolute against his wife, applied under section 5 of the Matrimonial Causes Act 1859 to vary a marriage settlement in order to reduce his wife's income considerably. The husband died prior to the determination of the application and the husband's personal representatives wished to proceed with it on behalf of the husband's estate. The question arose as to whether they could do so. Section 5 of the Matrimonial Causes Act 1859 gave the court jurisdiction to:

> "make such orders with reference to the application of the whole or a portion of the property settled *either for the*

> *benefit of the children of the marriage or of their respective parents* as to the Court shall seem fit." (Emphasis added)

Section 3 of the Matrimonial Causes Act 1878 provided:

> "The Court may exercise the powers vested in it by the provisions of section five of the [Matrimonial Causes Act 1859], notwithstanding that there are no children of the marriage."

43. The question arose as to whether the word "parents" in section 5 meant the parents personally. Sir Francis Jeune, the President, was prepared to contemplate that the word "parents" was not restricted to the parents personally. He stated at page 268 that:

> "it is not at all inconceivable that the Legislature may, if a husband or wife dies after the dissolution of their marriage, have intended to allow an application to vary settlements to be made for the benefit of their estates."

The President then proceeded to analyse the position if the word "parents" was not confined to parents personally. He contemplated the situation where there was a trust which passed in remainder to the relatives of the husband after his death. He considered that section 5 did not permit those relatives to apply for an order varying the settlement for their benefit. On this basis, the President reasoned that it was "impossible to suppose that the Legislature intended to grant to the representative of the husband what they denied to those persons whom the settlement itself named as the successors of his interest in it". The President gave another reason for limiting those entitled to apply under section 5 to the parents personally as being:

> "that if once you let in representatives of a husband or wife to claim you may be raising questions as to conflicting rights very difficult to decide without further guidance than the section affords. For instance, the relative means of the husband and wife, and even their wishes, are material to be considered in varying settlements; but such considerations as arise in these respects are supplanted by others totally different when the representatives, …, take the place of a party to a marriage."

He articulated a further reason for limiting those entitled to apply under section 5 to the parents personally as:

> "Again, while it is one thing to protect from pecuniary loss those directly affected by the breaking up of a home—namely, the parents and children—it is quite another thing to allow the dissolution of a marriage to bring a pecuniary benefit to persons who suffer no loss from it." (p 269)

He concluded that the statutory power to alter settlements was only available when there was some living person who could be benefited. The word "parents" in section 5 meant the "parents personally". On the facts of that case, the variation could not be for the benefit of the children of the marriage as there were none. The variation was not for the personal benefit of the wife, as her income would be considerably reduced. If the husband had been alive the variation would have been for his personal benefit, but since his death it was for the benefit of his estate. Accordingly, the President held that the court had no jurisdiction to entertain the application by the husband's personal representatives to vary the marriage settlement.

44. The Court of Appeal (Lindley, Lopes and Rigby LJJ) dismissed an appeal from the President's decision holding at page 272 that:

> "Both enactments are intended only to authorize the Court to act for the benefit of living persons. The present application seeks an order only for the benefit of the estate of a deceased person, and is not within those enactments."

45. The outcome in *Thomson* depended on the true construction of section 5. The husband's right to relief could only be exercised for his personal benefit with the effect that on his death no further proceedings could be taken by his personal representatives for the benefit of his estate.

46. The second is *Dipple v Dipple* [1942] P 65. The case concerned both the true construction of the statutory power under section 190(1) of the Supreme Court of Judicature (Consolidation) Act 1925 to make an order for secured maintenance, and the issue as to whether an application under section 190(1) was a cause of action within section 1(1) of the 1934 Act. In that case, the wife had obtained a decree absolute against the husband. She then applied for a secured maintenance order against the husband under section 190(1). However, before the application was

determined, the husband died intestate. The wife then applied to join the husband's personal representative as a party to the secured maintenance application on the ground that, notwithstanding the husband's death, her claim survived as a cause of action under section 1(1) of the 1934 Act. Section 190(1) of the Supreme Court of Judicature (Consolidation) Act 1925 provided that:

> "The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable."

Hodson J first addressed whether on the true construction of section 190(1), the right to secured maintenance on divorce was a personal right which ended with the death of the husband such that it could not be pursued against the deceased's estate. Hodson J considered, at page 67, that "[it] cannot, however, I think, be said that apart from the [1934 Act], an order of any sort under section 190 could have been made against any one but the living husband". Hodson J went on to hold that the wife's application under section 190(1) was not a cause of action within section 1(1) of the 1934 Act which on the death of the husband survived against his estate. He held, at page 68, that the wife:

> "has merely the right to ask the court to exercise *discretionary* powers in her favour [which] seems to me to be an essentially different thing from her having an enforceable claim against the husband." (Emphasis added).

That case is authority for both the personal nature of the right to claim a secured maintenance order and for the conclusion that an application for a secured maintenance order was not a cause of action.

47. The third is *Hinde v Hinde* [1953] 1 WLR 175. The case concerned the true construction of the statutory power under section 190(2) of the Supreme Court of Judicature (Consolidation) Act 1925 to order maintenance payments. In that case, after divorce, an order was made against the husband that he should pay a specified annual sum of maintenance to the wife until her remarriage. The husband died, and his executors refused to pay further maintenance to the wife who issued a summons applying for leave to issue execution of the maintenance order against the husband's

estate. Section 190(2) of the Supreme Court of Judicature (Consolidation) Act 1925 in so far as relevant provided that:

> "… the court may, if it thinks fit, by order, …, direct the husband to pay to the wife *during the joint lives of the husband and wife* such monthly or weekly sum for her maintenance and support as the court may think reasonable." (Emphasis added).

It was held by the Court of Appeal (Birkett and Morris LJJ) that the wife could not compel the husband's personal representatives to continue to pay maintenance to her after his death. On the true construction of section 190(2), the only jurisdiction the court had to order the husband to pay annual maintenance to his wife was limited to the period of joint lives. The order of the court was to be construed in relation to the powers of the court. The order was not made, and could not have been made, so as to operate beyond the period of the joint lives.

48. The fourth is *Sugden v Sugden*. The case concerned both (a) the true construction of a court order requiring a husband to pay maintenance to two children of the marriage and (b) the true construction of the statutory power under section 193 of the Supreme Court of Judicature (Consolidation) Act 1925 to make an order for maintenance of children extending beyond a husband's death. In that case, a husband died after an order to pay maintenance to the two children of the marriage had been made against him under, what was by the date of the hearing of the appeal, section 26 of the Matrimonial Causes Act 1950. The wife applied for an order that the husband's executrix should pay the arrears accrued since the husband's death and comply with the order. Section 26 in so far as relevant provided that:

> "(1) In any proceedings for divorce …, the court may ... make such provision as appears just with respect to the …, maintenance … of the children the marriage of whose parents is the subject of the proceedings, ….
>
> . . .
>
> (3) On any decree of divorce or nullity of marriage, the court shall have power to order the husband, …, to secure for the benefit of the children such gross sum of money or annual sum of money as the court may deem reasonable, ... :

> Provided that the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child will attain 21 years of age."

The Court of Appeal (Denning, Hodson and Morris LJJ) construed the order of the court as connoting an obligation by a living man to make periodical payments during the joint lives of himself and the children, which came to an end at his death. Denning LJ stated at page 134 that "if that is the proper interpretation of the order, it is the end of this case". However, he gave another reason for construing the order in that way which was to ensure that in making the order under the equivalent provision to section 26(1) "the court does not go beyond its jurisdiction" as he doubted "whether the Divorce Court has any jurisdiction to order a man's personal representatives to pay maintenance for his children after his death". He added that if it was desired to provide for maintenance for the children after the husband's death, the proper way is to order the husband during his lifetime to make a secured provision for the children by putting aside a fund on their behalf under section 26(3). Hodson LJ also construed the order of the court stating that this was sufficient to dispose of this appeal. However, at page 137, he added that, if an order purported to require "a man to pay to his wife periodical payments extending beyond his death", then such an order would prima facie be without jurisdiction. Morris LJ considered at page 138 that "this case can *primarily* be decided on a construction of the order" (Emphasis added). Nevertheless, he went on to state that he very much doubted whether there would be power in the court to make an order which would extend to bind a man's estate to make periodic payments.

49. Accordingly, in disposing of the appeal and in dismissing the wife's application all the members of the Court relied on two reasons. The first reason being the true construction of the order of the court, under which the obligation to pay maintenance came to an end on the husband's death. The second reason being the true construction of section 26(1) as creating a personal right which ended with the husband's death.

50. It is suggested on behalf of the appellant, incorrectly in my view, that the first reason is the only ratio decidendi of the decision in *Sugden*. However, a case can have more than one ratio.

51. In *Jacobs v London County Council* [1950] AC 361, Lord Simonds in his speech, with which all the other members of the House agreed, stated at page 369:

> "… there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing."

Lord Simonds then stated that a good illustration of this principle is to be found in *London Jewellers Ltd v Attenborough* [1934] 2 KB 206. In that case, the determination of one of the issues depended on how far the Court of Appeal was bound by its previous decision in *Folkes v King* [1923] 1 KB 282 in which case two grounds for its decision was given. The Court of Appeal in *London Jewellers Ltd v Attenborough* at page 222 stated:

> "In [*Folkes v King*] two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first; we must take both as forming the ground of the judgment."

52. Lord Simonds also cited with approval what Pickford LJ stated in *Cheater v Cater* [1918] 1 KB 247. In that case Pickford LJ, after citing a passage from the judgment of Mellish LJ, in *Erskine v Adeane* (1873) LR 8 Ch App 756 said:

> "That is a distinct statement of the law and not a dictum. It is the second ground given by the Lord Justice for his judgment. If a judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a dictum." (p 252)

53. I consider that a ratio of the decision in *Sugden* is that on the true construction of section 26(1) of the Matrimonial Causes Act 1950, there was no power to make an order for maintenance of children extending beyond the husband's death. Indeed, that was the sole ratio of *Sugden* identified by Lord Brandon in his speech in *Barder*. Lord Brandon having reviewed the Court of Appeal's decision in *Sugden*, stated, at page 35 F-G, that in *Sugden* the reason why the order could not be enforced against the husband's personal representatives after his death was that:

> "on the true construction of section 26(1) of the Matrimonial Causes Act 1950, which gave the court power to order a husband to pay maintenance for a child of a marriage after divorce, and of the order of the court made under that provision, the husband's obligation to pay lasted only so long as he lived."

Accordingly, the unanimous view of the House of Lords in *Barder* was that the ratio of the decision in *Sugden* turned on the true construction of section 26(1) of the Matrimonial Causes Act 1950 which created a personal obligation that lasted only so long as the husband lived.

54. The Court of Appeal in *Sugden* also considered whether there was in existence during the lifetime of the husband an enforceable claim against him which survived against his estate under section 1(1) of the 1934 Act. It is unsurprising that the members of the court decided that there was not, given that they all agreed that section 26(1) created a personal right which ended with the death of the husband. Denning LJ stated, at page 135, that there was no "enforceable right at the time of [the husband's] death". Hodson LJ adhered to his judgment in *Dipple v Dipple* that there was no cause of action within section 1(1) of the 1934 Act except that he agreed that the word "discretionary" which he had used in coming to that conclusion in *Dipple* (see para 46 above) was a misleading adjective. Morris LJ stated, at page 138, that "[it] seems to me that there is no room for the application of the [1934 Act], in this case". As the right against the husband was personal and ended on death, there was no cause of action which subsisted against and survived against his estate.

55. The fifth is *D'Este v D'Este* in which Ormrod J gave judgment on 6 November 1972. The case concerned the true construction of the statutory power under section 17 of the Matrimonial Causes Act 1965 and section 4 of the Matrimonial Proceedings and Property Act 1970 to vary matrimonial settlements. In that case, a husband obtained a decree absolute against his wife after their matrimonial home had been conveyed to them jointly. He remarried and applied to the court for variation of the post-nuptial settlement constituted by the conveyance of the former matrimonial home into joint names. Before the application was heard, he died and his second wife, in her capacity as his personal representative, sought to carry on the application. The question arose as to whether she could do so. Section 17(1) of the Matrimonial Causes Act 1965, provided:

> "(1) The court may, after granting a decree of divorce—

> (a) inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree ; and
>
> (b) make such orders as the court thinks fit as respects the application, for the benefit of the children of the marriage or the parties to the marriage, of the whole or any part of the property settled;
>
> and the court may exercise its powers under the foregoing provisions of this section notwithstanding that there are no children of the marriage."

Section 4 of the Matrimonial Proceedings Act 1970 in so far as relevant provided:

> "On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter ... the court may, …, make any one or more of the following orders, that is to say ... (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement ... made on the parties to the marriage; (*d*) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement; ...."

Ormrod J considered that the reasoning in the detailed judgment of Sir Francis Jeune P in *Thomson v Thomson* was conclusive so that an application for a variation under section 17 of the Matrimonial Causes Act 1965 and section 4 of the Matrimonial Proceedings and Property Act 1970 could only be made and proceeded with by one spouse against another while both remained alive. In arriving at that conclusion, he stated, at page 59 B-C, that:

> "… the whole of the matrimonial causes legislation, right back to 1857, is essentially a personal jurisdiction arising between parties to the marriage or the children of the marriage."

In his judgment he expanded upon the difficulty identified by Sir Francis Jeune "that if once you let in representatives of a husband or wife to claim you may be raising

questions as to conflicting rights very difficult to decide without further guidance than the section affords". Ormrod J stated, at pages 60 H to 61 A, that:

> "Clearly the facts upon which the court would have exercised its jurisdiction during the lifetime of the husband are now quite different and a decision which might be appropriate and fair during the lifetime of the husband might well be wholly inappropriate and unfair after his death."

He continued that the factors to be taken into consideration on an application between living parties to a marriage would be different from the kinds of considerations that come into the picture "if one has to consider the rights and position vis-à-vis a widow left badly off and a former divorced wife". He asked the question, at page 61 D-E: "… if the administratrix can come in and ask for a variation of settlements, why not creditors?". He continued by stating at page 61 E that:

> "I cannot see any reason why a creditor should not in certain circumstances take out letters of administration and make the application, in which case, of course, the court would be faced with a quite impossible conundrum."

Accordingly, Ormrod J held that on the true construction of both section 17 of the Matrimonial Causes Act 1965 and section 4 of the Matrimonial Proceedings and Property Act 1970, which gave the court power to vary settlements, an application for variation could only be made and proceeded with by one spouse against another while both remained alive. He stated, also at page 61 F, that:

> "whether one has to look to the terms of section 17 of the Act of 1965 or section 4 of the Matrimonial Proceedings and Property Act 1970, the one thing that seems abundantly plain is that the statute contemplates both the parties to the marriage surviving, …."

On this basis, the court had no jurisdiction to deal with the second wife's application as the personal representative of her husband's estate.

56. Further, he held that the right to apply was not a cause of action within section 1(1) of the 1934 Act and did not therefore survive for the benefit of the husband's estate.

57. It is against this contextual background, of there being a long-established legal understanding that rights against one's spouse are personal only and do not survive the death of either spouse, that the words of the 1973, 1975 and 1984 Acts must be interpreted. If a purpose of the statutes was to depart from that settled understanding, one would have expected there to be clear words to that effect. Instead, as will become apparent, Parliament used similar terminology as in an earlier statute which had been authoritatively interpreted as meaning that an application could only be made and proceeded with by one spouse against another while both remained alive.

9. The decision in *Harb v King Fahd Bin Abdul Aziz*

58. The judgment of the Court of Appeal in *Harb v King Fahd Bin Abdul Aziz* was given on 9 November 2005, after the enactment of the 1984 Act and the 1973 Act. Accordingly, the judgment does not form part of the legal context at the time at which those Acts were passed. However, the judgment is an authoritative decision based on the orthodox view.

59. The Court of Appeal (Thorpe, Dyson and Wall LJJ) considered whether section 27(6) of the 1973 Act enabled the court to make orders against the other party to the marriage during joint lives only. In that case, the applicant wife made an application for a financial provision order under section 27(6) on the ground that the respondent husband, the monarch of a sovereign state, had failed to provide reasonable maintenance for her. The husband's claim to immunity from suit on the ground of sovereign immunity succeeded. Permission to appeal was granted, with a hearing fixed for November 2005. On 1 August 2005, the husband died. His solicitors wrote to the Court of Appeal reporting the death and stating that the proceedings had thereby abated. The wife's solicitors disputed that contention. On a preliminary issue to determine the effect on the proceedings of the husband's death, the Court of Appeal held that section 27(6) of the 1973 Act enabled the court to make orders against the other party to a marriage during joint lives only. It followed that, since the wife intended to argue that the husband was not entitled to sovereign immunity and if successful sought to prove her entitlement to relief under section 27, she was precluded from taking those further proceedings by the death of the husband. The Court of Appeal further held that the wife’s appeal on sovereign immunity having become academic, it would not be permitted to continue.

60. Section 27 of the 1973 Act, as amended, in so far as relevant provided that:

"(1) *Either party to a marriage* may apply to the court for an order under this section on the ground that *the other party to the marriage* (in this section referred to as the respondent)— (a) has failed to provide reasonable maintenance for the applicant.

(2) ….

(3) Where an application under this section is made on the ground mentioned in subsection (1)(a) above, then, in deciding—(a) whether the respondent has failed to provide reasonable maintenance for the applicant, and (b) what order, if any, to make under this section in favour of the applicant, the court shall have regard to all the circumstances of the case including matters mentioned in section 25(2) above.

(4) ….

(5) ….

(6) Where on an application under this section the applicant satisfies the court of any ground mentioned in subsection (1) above, the court may make any one or more of the following orders, that is to say—(a) an order that the respondent shall make to the applicant such periodical payments, for such term, as may be specified in the order; (b) an order that the respondent shall secure to the applicant, to the satisfaction of the court, such periodical payments, for such term, as may be so specified; (c) an order that the respondent shall pay to the applicant such lump sum as may be so specified ...." (Emphasis added).

61. Thorpe LJ stated at para 9 that:

"It is to be noted that the right of application is given to 'either party to a marriage' and that the right is against 'the other party to the marriage'. The other party to the marriage is thereafter referred to as 'the respondent'. Subsection (6)

> enables the court to make orders against 'the respondent', by definition 'the other party to the marriage'. Thus these provisions are expressly limited to applications made during the joint lives of the parties."

He stated at para 16 that:

> "This construction of section 27 of the Matrimonial Causes Act 1973 is consistent with a long line of authority construing previous or related statutory provisions stretching back into the 19th century."

62. Dyson LJ in his concurring judgment stated at paras 37 and 41 that:

> "37. … No case has been cited to this court before (or since) *D'Este's* case was decided in which an application for, or in relation to, financial relief by one party to a marriage did not abate on the death of one of them.
>
> 41. In my view, therefore, section 27 must be construed against the background of the earlier legislation and how that earlier legislation had been interpreted and understood."

63. Wall LJ in his concurring judgment stated at para 57 that:

> "[for] section 27 to apply there must be a subsisting marriage. Mrs Harb's alleged marriage to the king no longer subsists, and the death of the king deprives the court of jurisdiction to grant Mrs Harb any relief under section 27. That, to my mind, is the short and simple answer to the issue before us."

64. I consider that the decision in *Harb v King Fahd Bin Abdul Aziz* is further authority that the 1973 Act must be construed and interpreted against the background of the earlier legislation and how that earlier legislation had been interpreted and understood. The 1984 Act cross-refers to the 1973 Act in that orders for financial relief under the 1984 Act include those which can be made under sections 23(1) and 24(1) of the 1973 Act. I consider this cross-reference to be a further reason why on its true

construction an order for financial relief under the 1984 Act is personal to the parties so that it is limited to applications brought and continued during joint lives.

10. Interplay between the orthodox understanding and legislation in relation to inheritance

65. The orthodox understanding that financial provision on divorce only enables orders to be made as between living parties to a former marriage is also to be found in the provisions which Parliament has enacted in relation to inheritance in the 1975 Act.

(a) Special inheritance provision for a former spouse prevented from obtaining a share of the family assets in matrimonial proceedings following the death of the other spouse

66. Section 14 (1) of the 1975 Act made special provision for a former spouse prevented from obtaining a share of the family assets in matrimonial proceedings by the death of the other spouse. Special provision was required because, in accordance with the orthodox understanding, the supervening death of the other spouse would prevent a court making an order for financial provision in matrimonial proceedings brought or continued against the estate of a deceased spouse.

67. Section 1 of the 1975 Act enables a former wife or former husband of the deceased who has not remarried to apply to the court for "an order under section 2" "on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make *reasonable financial provision* for the applicant" (emphasis added).

68. In respect of a former wife or former husband, reasonable financial provision is confined to a needs-based claim for "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his *maintenance*" (emphasis added). However, in respect of the wife or husband of the deceased, reasonable financial provision was not restricted to a needs-based claim of "maintenance" but extended to a sharing-based claim of "such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, ….". Furthermore, in determining the claim of a husband or wife of the deceased, the court is required under section 3(2) of the 1975 Act to have regard to the provision which the applicant might reasonably have expected to receive, if on the day on which the deceased died, the marriage, instead of being terminated by death, had been terminated by a decree of divorce.

69. On the orthodox view, a claim for a property adjustment order under section 24(1) of the 1973 Act was a personal right which on death did not permit proceedings to be brought or continued against the deceased's estate. So, if the husband died before a former wife had obtained a property adjustment order under section 24(1) of the 1973 Act, she would be restricted to financial provision by way of a needs-based claim for "maintenance" on an application under the 1975 Act. However, a wife of the deceased would be entitled on an application under the 1975 Act to a far more wide-ranging redistribution of the assets of the deceased, somewhat similar to a redistribution under the 1973 Act. There would be an obvious lacuna in the law if a former wife or a former husband could be deprived of more extensive rights and be restricted to financial provision by way of "maintenance" by virtue of the untimely death of the deceased.

70. The Law Commission in its "Second Report On Family Property: Family Provision on Death" (1974) (Law Com No 61) made recommendations which led to the enactment of the 1975 Act. At para 60 of the report, the Law Commission's recommendations were based on the orthodox view that where a party to matrimonial proceedings died before the financial claims were adjudicated those claims could not be pursued against the deceased's estate. The report stated at para 60 that:

> "under the present law the former spouse or the judicially separated spouse has the opportunity during the deceased's lifetime to obtain a share of the family assets in matrimonial proceedings. There will, however, be cases where, even under the present law, the former spouse or the judicially separated spouse has no such opportunity because the death of the other spouse has supervened before the court has made an order for financial provision in the matrimonial proceedings. We consider that special provision should be made for such a spouse who, without fault on her part, is placed in this situation."

At paras 62 and 63, the Law Commission recommended that:

> "… the court should be empowered, on a claim for family provision by a former spouse, or a judicially separated spouse, whose financial position was not dealt with by an order for financial provision in the matrimonial proceedings, to apply the standard of provision applicable to claims by surviving spouses, where it considers it just so to do.

> 63. [and] that the above proposal, which is designed to deal with an exceptional type of situation, should in the interests of certainty and finality be limited to applications where the deceased has died within twelve months of the grant of the relevant decree absolute of divorce or nullity, or decree of judicial separation, as the case may be."

71. In response to those recommendations, Parliament enacted section 14(1) of the 1975 Act which, under the heading of "Provision as to cases where no financial relief was granted in divorce proceedings etc.", provided:

> "(1) Where, within twelve months from the date on which a decree of divorce or nullity of marriage has been made absolute or a decree of judicial separation has been granted, a party to the marriage dies and—
>
> (a) an application for a financial provision order under section 23 of the Matrimonial Causes Act 1973 or a property adjustment order under section 24 of that Act has not been made by the other party to that marriage, or
>
> (b) such an application has been made but the proceedings thereon have not been determined at the time of the death of the deceased,
>
> then, if an application for an order under section 2 of this Act is made by that other party, the court shall, notwithstanding anything in section 1 or section 3 of this Act, have power, if it thinks it just to do so, to treat that party for the purposes of that application as if the decree of divorce or nullity of marriage had not been made absolute or the decree of judicial separation had not been granted, as the case may be."

72. I consider that Parliament enacted section 14 based on the orthodox understanding that where a party to matrimonial proceedings died before the financial claims were adjudicated, those claims could not be pursued against the deceased's estate.

(b) An amendment in 1984 to the 1975 Act would have been unnecessary if a former spouse divorced overseas could maintain a claim under the 1984 Act against the estate of the deceased

73. As originally enacted the definition of a former wife or former husband in the 1975 Act was limited by section 25(1) to persons whose marriages have been dissolved or annulled by decree of an English court under the 1973 Act. Accordingly, it would not have been open to a person who was a former wife or former husband by virtue of an overseas divorce to make an application for financial provision under the 1975 Act on the death of the deceased. If a person who had been divorced overseas could maintain a claim under the 1984 Act for an order for financial provision against the estate of the deceased, then there would be no lacuna as that person would not have to rely on the 1975 Act in circumstances where the other party to the former marriage had died. However, there would be a lacuna if the rights of the person under the 1984 Act were personal rights so that no further proceedings could be taken after the death of one of the parties to the former marriage.

74. The Law Commission in its report entitled "Family Law: Financial Relief after Foreign Divorce" (Law Com No 117) proceeded on the basis that there was such a lacuna and identified the serious hardship caused by it at para 1.2. The Law Commission recommended, at para 2.18 that section 25(1) of the 1975 Act should "be changed to enable a person divorced abroad to apply for relief under that Act on the same terms as a person divorced in this country". Subsequently, by section 25(2) in Part III of the 1984 Act, Parliament amended the limited definition of "former wife" and "former husband" in section 25(1) of the 1975 Act. The updated definition "former wife" or "former husband" was:

> "a person whose marriage with the deceased was during the lifetime of the deceased either— (a) dissolved or annulled by a decree of divorce or a decree of nullity of marriage granted under the law of any part of the British Islands, or (b) dissolved or annulled in any country or territory outside the British Islands by a divorce or annulment which is entitled to be recognised as valid by the law of England and Wales."

Quite simply, that amendment would not have been necessary if the former wife or former husband who had been divorced overseas could have maintained a claim under the 1984 Act for an order for financial provision against the estate of the deceased. The amendment enacted in the 1984 Act, to my mind, is a powerful aid to the construction of the other provisions in the same Act as only creating personal rights

which do not survive the death of a former party to a marriage such as to be enforceable against the deceased's estate.

(c) Avoidance of the duplication of two different routes to claim financial relief or financial provision on the death of the other party to the marriage

75. The true construction of Part III of the 1984 Act should avoid the duplication which would otherwise occur by the creation of two different routes to secure financial relief or financial provision on the death of the other party to the marriage. One route would be for a person divorced overseas to bring or continue proceedings under the 1984 Act against the estate of a deceased for an order for financial relief and the other route would be for the same person to bring proceedings for financial provision under the 1975 Act. I consider that a construction of the 1984 Act which avoids this duplication should be adopted. Accordingly, the right to apply for financial relief in Part III of the 1984 Act after an overseas divorce must be a personal right such that the proceedings cannot be continued against the deceased's estate. I consider this to be another aid to the construction of the 1984 Act as only creating personal rights which do not survive death.

(d) Inconsistent provisions as to the time for making applications as between the 1984 Act and the 1975 Act if a claim under the 1984 Act survives the other spouse's death

76. An application under section 12(1) of the 1984 Act is for any of the financial provision orders mentioned in section 23(1) of the 1973 Act or any of the property adjustment orders mentioned in section 24(1) of the 1973 Act. The only time constraint to a claim under the 1984 Act in relation to an application for financial relief is to be found in section 16, which requires the court before making an order for financial relief to consider whether, in all the circumstances of the case, it would be appropriate for such an order to be made by a court in England and Wales. In determining whether it is appropriate for such an order to be made, the court is required to consider, amongst other matters, "the length of time which has elapsed since the date of the divorce, annulment or legal separation"; see section 16(2)(i). If the right to apply for financial relief after an overseas divorce can be continued against the deceased's estate, there would be no other time constraint, there being no time limit to financial order claims under the 1973 Act; see *Wyatt v Vince* [2015] UKSC 14; [2015] 1 WLR 1228. However, under section 4 of the 1975 Act, there is a six-month time limit within which an application is to be made, starting from the date on which the grant of representation in respect of the estate of the deceased is first taken out (subject to a discretion to permit an application after the end of that period). Accordingly, if an application under section 12 of the 1984 Act could be brought against the deceased's estate, the time constraints would be entirely different from

those imposed in relation to an application under the 1975 Act. A construction that avoids the incongruity of different time constraints is appropriate. I consider this to be another aid to the construction of the 1984 Act as only creating personal rights which do not survive death.

(e) Evasion of the requirement under the 1975 Act that the deceased dies domiciled in England and Wales

77. Section 1(1) of the 1975 Act contains a requirement for an application to be made for financial provision from the deceased's estate that the deceased "dies domiciled in England and Wales". The Law Commission in its report entitled "Family Law: Financial Relief after Foreign Divorce" recommended maintaining that requirement. The effect of the requirement is that a person divorced overseas and a person divorced in England and Wales have the same rights to apply for relief under the 1975 Act. If the deceased did not die domiciled in England and Wales neither can apply for relief under the 1975 Act. However, the requirement of the deceased dying domiciled in England and Wales would count for nought if a former wife or former husband who had been divorced either in England and Wales or overseas could maintain a claim under the 1973 or 1984 Acts against the estate of the deceased. I consider this to be another aid to the construction of the 1984 Act as only creating personal rights which do not survive death.

11. A textual analysis of the statutory provisions to determine whether the rights are personal

78. The respondent contends that a textual analysis of the words which Parliament has chosen to enact leads to the conclusion that where one of the parties to an application under Part III of the 1984 Act for financial relief has died, further proceedings cannot be taken as the relief is purely personal relief available only during the joint lives of the parties to the marriage.

79. To consider a textual analysis of the 1984 and 1973 Acts it is appropriate to set out and analyse some of the provisions of both of those Acts.

80. I should state at this stage that a purely textual analysis provides strong, rather than conclusive, indicators, that the court lacks jurisdiction to make an order for financial relief under the 1984 Act on the death of one of the parties to the marriage. However, I consider the indicators are conclusive when viewed in the legal context of the established orthodox understanding that matrimonial legislation creates personal

rights and obligations which end with the death of a party to the marriage, and which cannot be pursued against the deceased's estate.

81. Part III of the 1984 Act is headed "Financial Relief in England and Wales After Overseas Divorce etc". Section 12(1), as amended by the Civil Partnership Act 2004, headed "Applications for financial relief after overseas divorce etc", in so far as relevant, provides:

> "(1) Where—
>
> > (a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, *by means of judicial or other proceedings* in an overseas country, and
> >
> > (b) the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales,
>
> *either party to the marriage* may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part of this Act.
>
> (2) ….
>
> (3)….
>
> (4) In this Part of this Act … 'order for financial relief' means an order under section 17 or 22 below of a description referred to in that section." (Emphasis added).

82. The respondent acknowledges that the emphasised words in section 12(1), "either party to the marriage", must in circumstances where a marriage has been dissolved, include either party to a former marriage and in circumstances where a marriage has been annulled, include either party to a marriage declared invalid.

83. I consider that several points can be made about the language used by Parliament in section 12(1).

84. First, section 12(1) only contemplates a person being a party to a former marriage in circumstances where the marriage has been dissolved "*by means of judicial or other proceedings"* as opposed to ending on death.

85. Second, given that Parliament is presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions (see para 37 above) it would have been aware of the established orthodox view in judicial decisions starting with *Thomson v Thomson* (see paras 42 to 56 above) that a claim for financial relief would fall away on the death of one of the spouses. Accordingly, I consider that Parliament would have made express provision within section 12 enabling claims to be brought against or for the benefit of an estate if Part III financial relief was to be available in circumstances where one of the parties had died. By way of contrast Parliament did make express provision in section 26 of the Matrimonial Causes Act 1965 for "Orders for maintenance from deceased's estate." However, there is no express provision in section 12 in that there is no reference to the estate, representative, heirs, or successors of either party to the marriage.

86. Third, Parliament used the phrase "either party to the marriage" in section 12(1) which is similar to the phrase "the parties to the marriage" in section 17(1) of the Matrimonial Causes Act 1965. The phrase in section 17(1) was construed by Ormrod J in *D'Este* as meaning an application could only be made and proceeded with by one spouse against another whilst both remained alive, see para 55 above. I consider that had a purpose of section 12(1) been to depart from that orthodox interpretation of section 17(1), one would have expected different words to have been used.

87. Fourth, construing the phrase "either party to the marriage" in section 12(1) as meaning the parties personally but not their respective estates, maintains the interplay between the 1984 Act and the 1975 Act, see paras 65-77 above. If the phrase in section 12(1) enabled orders to be made against the estate of a deceased spouse, then (a) it would have been unnecessary for the Law Commission to recommend and for Parliament to enact section 14(1) of the 1975 Act, see paras 66 to 72 above; (b) it would have been unnecessary in 1984 for Parliament to amend the 1975 Act to enable a person whose marriage had been dissolved or annulled in any country or territory outside the British Islands to make an application under the 1975 Act, see paras 73-74 above; (c) it would have been unnecessary for Parliament to have created two routes by which a person divorced overseas could bring or continue proceedings for an order for financial relief or financial provision, see para 75 above; (d) there would be inconsistent provisions as to the time within which applications could be made under

the 1984 Act and the 1975 Act, see para 76 above; and (e) the requirement that the deceased dies domiciled in England and Wales contained in the 1975 Act would be evaded by bringing or continuing an application under the 1984 Act against the estate of the deceased spouse, see para 77 above.

88. I therefore consider that a textual analysis of section 12(1) provides a strong indicator that the court lacks jurisdiction to make an order for financial relief under the 1984 Act on the death of one of the parties to the marriage.

89. Section 16, headed "Duty of the court to consider whether England and Wales is appropriate venue for application" and in so far as relevant provides:

> "(1) Before making an order for financial relief the court shall consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in England and Wales, and if the court is not satisfied that it would be appropriate, the court shall dismiss the application.
>
> (2) The court shall in particular have regard to the following matters—
>
> > (a) the connection which the parties to the marriage *have* with England and Wales;
> >
> > (b) the connection which those parties *have* with the country in which the marriage was dissolved or annulled or in which they were legally separated;
> >
> > (c) the connection which those parties *have* with any other country outside England and Wales;
> >
> > (d) any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside England and Wales;

(e) in a case where an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with;

(f) any right which the applicant *has*, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside England and Wales and if the applicant has omitted to exercise that right the reason for that omission;

(g) the availability in England and Wales of any property in respect of which an order under this Part of this Act in favour of the applicant could be made;

(h) the extent to which any order made under this Part of this Act is likely to be enforceable;

(i) the length of time which has elapsed since the date of the divorce, annulment or legal separation." (Emphasis added).

90. As emphasised, section 16 sets out the duty of the court to consider whether England and Wales is the appropriate venue for the application by reference to the connections which the parties "have" with (a) England and Wales; (b) the country in which the marriage was dissolved or annulled or in which they were legally separated; and (c) any other country outside England and Wales. Furthermore, the duty of the court is to consider any right which the applicant "has" to apply for financial relief from the other party to the marriage under the law of any country outside England and Wales. If the correct interpretation was that the discretionary exercise could be carried out in circumstances where one or, as in this case, both of the parties to the marriage had died, then one would have expected that the past tense would have been used as well as the present tense.

91. I therefore consider that a textual analysis of language used in section 16 provides a strong indicator that the discretionary exercise is to be carried out in

respect of an application between two living parties to the marriage and that the court lacks jurisdiction to make an order for financial relief under the 1984 Act on the death of one of the parties to the marriage.

92. Section 17, headed "Orders for financial provision and property adjustment" as amended, makes provision for the orders for financial relief which a court may make under the 1984 Act. For instance, the court may make (i) any order mentioned in section 23(1) of the 1973 Act (financial provision orders); and (ii) any order mentioned in section 24(1) of the 1973 Act (property adjustment orders). Both section 23(1) and section 24(1) of the 1973 Act refer to "either party to the marriage" or "a party to the marriage". I illustrate by the emphasised words in section 23(1) of the 1973 Act which provides as follows:

> "(1) On making a divorce, nullity of marriage or judicial separation order or at any time after making such an order (whether, in the case of a divorce or nullity of marriage order, before or after the order is made final), the court may make any one or more of the following orders, that is to say—
>
> (a) an order that *either party to the marriage* shall make to the other such periodical payments, for such term, as may be specified in the order;
>
> (b) an order that *either party to the marriage* shall secure to the other to the satisfaction of the court such periodical payments, for such term, as may be so specified;
>
> (c) an order that *either party to the marriage* shall pay to the other such lump sum or sums as may be so specified;
>
> (d) an order that *a party to the marriage* shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments, for such term, as may be so specified;
>
> (e) an order that *a party to the marriage* shall secure to such person as may be so specified for the benefit of such a child, or to such a child, to the satisfaction of the court, such periodical payments, for such term, as may be so specified;

> (f) an order that *a party to the marriage* shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified;
>
> subject, however, in the case of an order under paragraph (d), (e) or (f) above, to the restrictions imposed by section 29(1) and (3) below on the making of financial provision orders in favour of children who have attained the age of eighteen." (Emphasis added).

93. I consider that this is a further textual indication that the correct interpretation is that the orders which could be made are personal to living parties to a marriage. There is no mention of orders being made against the estate, representative, heirs or successors of a party to the marriage. Ordinarily, I would not expect legislation to deal specifically with succession on death because it is dealt with automatically by the 1934 Act, which operates unless disapplied. However, here the legal, social, and historical context is different for all the reasons which I have given in para 85 above. For instance, Parliament is presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions. Accordingly, the context here gives rise to an expectation that Parliament would have used express language if an order could be made on the death of one of the parties to the marriage. The absence of such express language is a further indication that an order for financial relief under the 1984 Act which cross-refers to the 1973 Act is personal to the parties to the marriage.

94. In conclusion, subject only to consideration of a line of authorities applying the principles in *Barder*, I consider that the court lacks jurisdiction to make an order for financial relief under the 1984 Act on the death of one of the parties to the marriage.

12. Authorities in relation to *Barder* events

95. Mostyn J, in that part of his judgment from paras 54–68 headed "Do both parties need to be alive?", considered that the *Barder* line of authorities "completely belies the doctrine that both parties have to be alive in order for the powers and discretion embodied in sections 23, 24 and 25 [of the 1973 Act] to be exercised".

96. In *Barder*, the judge granted the husband's application for leave to appeal out of time against the consent order after the time limit for appealing against the order had expired, but before it had been executed, in circumstances where the wife killed the children and committed suicide. Furthermore, the judge allowed the appeal and set

aside the order on the ground that it had been vitiated by a fundamental mistake, common to both parties, namely that it had been considered that for an appreciable period after the order the wife and children would continue to live and benefit from the terms of the order. Having set aside the order, the judge did not make a new order under the 1973 Act. The House of Lords, reversing the Court of Appeal, reinstated the judge's order.

97. The decision of the House of Lords in *Barder* established the principle that "a court may properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after a divorce on the ground of new events, provided certain conditions are satisfied": [1988] AC 20, 43. The conditions as then articulated were (a) new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed; (b) the new events should have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, Lord Brandon regarded it as extremely unlikely that it could be as much as a year, and that in most cases it would be no more than a few months; (c) the application for leave to appeal out of time should be made reasonably promptly in the circumstances of the case; and (d) the grant of leave to appeal out of time should not prejudice third parties who have acquired, in good faith and for valuable consideration, interests in property that is the subject matter of the relevant order.

98. In *Smith v Smith* [1992] Fam 69, the Court of Appeal, in applying the principles in *Barder*, rather than simply setting aside the earlier order, considered and determined the order which should have been made in view of the new events which had occurred. In that case, the earlier order made by the registrar required the husband to pay the wife a lump sum of £54,000 on a clean break basis. The husband made the payment. Within six months of the order the wife committed suicide, bequeathing her estate to her daughter as the sole beneficiary. The husband applied for, and the judge granted, leave to appeal the registrar's order out of time. The judge then reconsidered what order should be made given that the wife had died. In doing so he assessed the wife's needs as non-existent subject to the debts and costs of her estate. Accordingly, he directed that the lump sum be repaid, save for such sum as was necessary to discharge the obligations of the estate. On appeal to the Court of Appeal, no issue was taken as to the grant of leave to appeal by the judge. Rather, the issue was as to the order which the judge ought to have made between the spouses where it was now known that at the date of the registrar's order the wife had only six months or so to live. Butler-Sloss LJ, with whom Lord Donaldson of Lymington MR and Stocker LJ agreed, stated, at pages 76 H – 77 A that:

> "In my judgment the correct approach is to start again from the beginning and consider what order should be made on the facts before the judge. …. The issue now is as to the right order to be made between the spouses where the wife is known to have only six months or so to live."

She then proceeded to consider the criteria in section 25(2) of the 1973 Act finding at page 78 B that:

> "A wife with few or no needs, who had nonetheless made a significant contribution to the marriage, has in my judgment a right to recognition of that contribution in money terms where there are assets available to meet it so long as the court does not act to the unjust detriment of the other spouse."

Taking all the criteria into account and exercising the discretion under section 25 of the 1973 Act afresh, she awarded the wife £25,000 and varied the judge's order.

99. *Reid v Reid* [2004] 1 FLR 736 and *WA v Estate of HA* [2015] EWHC 2233 (Fam), [2016] 1 FLR 1360 are further instances of a court exercising discretion to grant leave to appeal out of time where within a short time of an order being made one of the spouses had died. In both cases not only was the appeal allowed but also the court then made whatever order was appropriate taking into account the facts as known at the date of reassessment and having regard to all the criteria set out for consideration in section 25 of the 1973 Act.

100. If an applicant successfully satisfies the conditions for leave to appeal applying the principles in *Barder* and if the appeal is allowed, then the appeal court can, on a redetermination, consider what order ought to have been made, even though one of the spouses has died. I consider this to be a discrete but limited exception to the general rule that the 1973 Act creates personal rights and obligations which end with the death of a party to the marriage, and which cannot be pursued against the deceased's estate. I consider that this limited exception is not a sufficient basis on which to undertake a radical change to the construction of matrimonial legislation.

13. Conclusion

101. The appellant's submission that a party to a marriage can continue a claim under the 1984 Act read with the 1973 Act, despite the death of the other party to the marriage, would, in my judgment, be a major reform involving radical change to long-established principles. Furthermore, the reform would involve questions of policy including its impact on the law of succession and potentially also on the law of insolvency. There may be a case for reform and that is why I indicated that Mostyn J's judgment is potentially seminal. However, 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.

102. The answer to the real question on this appeal (see para 30 above) is that on the true construction of the statutory provisions in the 1984 Act and the 1973 Act where one of the parties to an application under Part III of the 1984 Act for financial relief has died further proceedings cannot be taken. The power of a court in England and Wales to order financial relief after an overseas divorce can only be exercised as between living parties to a former marriage. Accordingly, I would dismiss the appeal.

103. As, on their true construction, the statutory provisions in the 1984 Act and the 1973 Act create personal rights and obligations which can only be adjudicated between living parties, the issue as to whether a claim for financial relief under the 1984 Act is a cause of action which survives against the estate of a deceased spouse under section 1(1) of the 1934 Act does not arise for determination.

LORD LEGGATT (concurring) (with whom Lord Hodge, Lord Hamblen and Lord Burrows agree):

104. I agree with Lord Stephens that the appeal must be dismissed. But as we are disappointing the hope of Mostyn J that his decision would be overturned on appeal, I wish to add some observations about the defect in the law which his important judgment has exposed.

The 1934 Act

105. It was the general rule at common law that a personal (rather than proprietary) cause of action died on the death of either party. The injustice of this rule was not diminished by expressing it in Latin as the maxim "actio personalis moritur cum persona". The rule was almost entirely abolished by the Law Reform (Miscellaneous

Provisions) Act 1934. Section 1(1) of that Act provides that, subject to specified exceptions, on the death of any person "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." The expression "cause of action" is not defined and thus bears its ordinary legal meaning of "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person" (*Letang v Cooper* [1965] 1 QB 232 at 242-243, per Diplock LJ). Notably, section 1(1) is not limited to claims seeking a remedy for a tort or other wrong. It applies to causes of action of any kind. That includes, for example, causes of action founded on unjust enrichment, such as a claim for restitution of money paid under a mistake or on a basis that has failed.

106. The exceptions specified in section 1(1) are now limited to causes of action for defamation (and, by section 1A, a person's right to claim bereavement damages under the Fatal Accidents Act 1976 does not survive for the benefit of the estate of that person). The exceptions originally included certain (now defunct) causes of action in the field of matrimonial law (seduction, inducing one spouse to leave or remain apart from the other and claims for damages on the ground of adultery) but have never included claims for financial provision on divorce. Yet in several cases courts have held that such claims are not causes of action which survive the death of either party.

The issue raised in this case

107. The present case illustrates the injustice to which this can give rise. After an overseas divorce, the wife was given leave in August 2017 to apply for financial relief in England and Wales under Part III of the Matrimonial and Family Proceedings Act 1984 ("Part III"). The husband declared capital of £7 million, which the wife believed was very substantially understated. The proceedings were protracted by the husband's delays and defaults in giving disclosure of documents. Eventually, the trial was listed to take place in June 2020; but it was then adjourned because of the Covid pandemic and relisted for 8 February 2021. Just before that date, the husband died. The judge, Mostyn J, considered that in these circumstances he was bound by authority to dismiss the wife's application.

108. Mostyn J contrasted this outcome with what the position would have been if either party had died just *after* the application was heard. This is illustrated by *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244, where the wife died unexpectedly just over two months after a judgment had been given ordering the husband to pay her a lump sum of some £3.3 million. The Court of Appeal refused to allow the husband to reopen the award. The essential reason given by Munby LJ was that the wife "had *earned* her equal share [of the] matrimonial assets" and was

entitled to have that recognised by the court. He described this as the "magnetic, indeed overwhelming, factor" in the case: para 19.

109. The same factor may of course be present in a case where a party dies shortly before it is decided, as happened here. Mostyn J described the difference in outcome if the claim cannot survive in this situation as "illogical, arbitrary and capable of meting out great injustice": [2021] EWHC 1791 (Fam), [2022] Fam 1, para 68. I agree.

110. Since Mostyn J gave his judgment in these proceedings, the wife has also died. The dispute has therefore become one between the two estates. But this does not lessen the injustice of dismissing the claim. The extinction of a financial order claim upon the death of either party prevents the court from making a fair division of the matrimonial assets. The consequence is that one party's estate potentially makes an unfair gain at the expense of the other's.

111. Why has the 1934 Act not averted such injustice, as it has in other areas of the law? Three reasons are suggested by the case law. I will explain why two of them are no longer tenable. As Lord Stephens has demonstrated, however, the third is a product of statute which only Parliament can change.

(1) The "mere hope" argument

112. In *Dipple v Dipple* [1942] P 65 Hodson J held that a wife's claim for a secured maintenance order was not a "cause of action" for the purpose of the 1934 Act and so did not survive the husband's death. The judge said that the wife had "merely the right to ask the court to exercise discretionary powers in her favour" which was "an essentially different thing from her having an enforceable claim against the husband." (p 68)

113. In *Sugden v Sugden* [1957] P 120, 135, Denning LJ observed that the fact that the relief claimed is discretionary cannot be enough to take a claim outside the scope of the 1934 Act. He gave the example of a claim for an injunction. An injunction is a discretionary remedy, but it can be the subject of a cause of action (for example, for a tort or breach of contract). This is true more generally. A claim can still properly be regarded as enforceable where the court has a discretion - which will invariably be governed by principle and not wholly unfettered - in deciding what remedy to grant. I take the relevant test for the purpose of the 1934 Act to be whether the claim is an existing chose in action, and therefore a form of property capable in principle of being transferred from one person to another, rather than merely an expectancy or hope.

114. This was the test which Denning LJ in *Sugden* regarded as applicable. He said - again clearly correctly, in my view - that the "causes of action" covered by section 1(1) the 1934 Act include "rights enforceable by proceedings in the Divorce Court, provided that they really are rights and not mere hopes or contingencies" (see p 134). He nevertheless agreed with the decision in *Dipple* on the ground that the applicant in that case had only a "hope" that an order would be made and no right to an order until it was actually made (p 135). So as the husband had died before an order was made, there was no cause of action which could survive his death by operation of the 1934 Act. Although this reasoning was obiter, it has been applied in later cases, including by analogy to claims brought under the Inheritance (Provision for Family and Dependants) Act 1975: see *D'Este v D'Este* [1973] Fam 55; *Whytte v Ticehurst* [1986] Fam 64; *In re Bramwell, decd; Campbell v Tobin* [1988] 2 FLR 263; *Roberts v Fresco* [2017] EWHC 283 (Ch), [2017] Ch 433.

115. As Lord Stephens has made clear at para 8 above, however, such reasoning is not compatible with the modern law. As reflected in the decisions of the House of Lords in *White v White* [2001] 1 AC 596 and *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618, there has in recent years been a paradigm shift in judicial attitude and approach towards financial order claims. Such claims are now seen as a matter of right, not of mere hope or contingency. In the words of Lord Nicholls in *Miller*, para 9:

> "The financial provision made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. It is not a case of 'taking away' from one party and 'giving' to the other property which 'belongs' to the former. The claimant is not a supplicant. Each party to a marriage is *entitled* to a *fair* share of the available property." (emphasis in original).

116. There can therefore be no doubt that, today, a financial order claim is not a mere hope or contingency. It is a cause of action and is therefore capable in principle of passing on death by operation of the 1934 Act.

(2) The nature of the claim

117. Some causes of action will not pass to the deceased's estate pursuant to the 1934 Act because it is a necessary condition of the claim that the parties are alive. For example, a contract to supply personal services will generally be discharged by the death of the supplier. So, if the supplier dies, there will be no subsisting right to enforce future performance against or for the benefit of the supplier's estate.

118. Most, if not all, of the cases in which financial order claims have been found not to survive a party's death are explicable on this basis. For example, in *Thomson v Thomson* [1896] P 263 the husband, after being granted a divorce on the ground of the wife's adultery, applied for a variation of the marriage settlement to reduce the annual amount payable to her. The husband then died before the application was heard. Under the applicable legislation the settlement could only be varied "for the benefit of the innocent party, and of the children of the marriage, or either or any of them" (section 45 of the Matrimonial Causes Act 1857) or "for the benefit of the children of the marriage or of their respective parents" (section 5 of the Matrimonial Causes Act 1859). The Court of Appeal reasoned that a settlement could only be made or varied for the benefit of any of these persons if they were living. As there were no children of the marriage, the husband had died and the proposed variation would not be for the benefit of the wife, the powers could not be exercised.

119. Aside from altering a marriage settlement, from the inception of the Divorce Court in 1857 and for much of the twentieth century the primary form of financial provision which the court could make following separation or divorce was an order for maintenance (originally payable only by the husband to the wife). This could take the form either of an order requiring the husband to secure to the wife a gross sum or annual sum for any term not exceeding her life or an order directing the husband to pay to the wife during their joint lives a monthly or weekly sum for her maintenance (see eg section 19(2) and (3) of the Matrimonial Causes Act 1950). As the purpose of such an order was to meet the wife's living expenses, it was logical that the term for which any order could be made was expressly limited to her lifetime. It followed that no order could be made after the wife had died. An order directing the husband to make periodical payments for the wife's maintenance was also limited by the express words of the legislation to the husband's lifetime. The rationale was presumably that a husband's obligation to maintain his wife (or former wife) ended on his (or her) death.

120. In *Sugden* the issue was whether the obligation imposed by an order requiring the husband to make monthly payments for the maintenance of his children until they each reached the age of 21 ended on his death. The Court of Appeal held that this was the effect of the order. The members of the Court of Appeal further doubted whether the court would have had power to make an unsecured order requiring the husband to make periodical payments of maintenance for the benefit of his children which extended beyond his lifetime. Section 26 of the 1950 Act gave the court power, in subsection (3), to order the husband to secure for the benefit of the children a gross sum or annual sum of money; but it contained no equivalent provision to section 19(3) under which a husband could be ordered to make monthly or weekly payments for the wife's maintenance during their joint lives. Section 26(1) gave the court a general power to "make such provision as appears just with respect to the custody, maintenance and education of the children". But the Court of Appeal evidently did not

consider that this could be interpreted as giving the court power to order a husband to make periodical payments for the maintenance of the children for a term beyond his lifetime when no such order could be made for the benefit of the wife.

121. In *Harb v King Fahd Bin Abdul Aziz* [2005] EWCA Civ 1324, [2006] 1 WLR 578 the wife (who remained married) applied for an order under section 27 of the Matrimonial Causes Act 1973 on the ground that the husband had failed to provide reasonable maintenance for her. The husband died before the claim was heard and the Court of Appeal held that the claim could not be continued against his estate. The ratio of the decision was that, on the proper interpretation of section 27, an order under that section can only be made if both parties are alive. The simplest explanation was that given by Wall LJ, at para 57 (quoted by Lord Stephens at para 63 above): namely, that section 27 (unlike sections 23 and 24 of the 1973 Act) applies only where the parties are married. As a marriage ends on either party's death, it follows that there is no power to make an order under section 27 after either party has died.

122. It is only since the legislative changes embodied in the Matrimonial Proceedings and Property Act 1970, and consolidated in the 1973 Act, that the focus of financial provision on divorce has extended beyond provision required for maintenance to include the equitable division of matrimonial property. As explained by Lord Nicholls in *Miller* at paras 10-20, under the modern law an obligation on the main money-earner (traditionally the husband) to meet the needs of the other party is only one of the principles which underpin the making of financial orders on divorce. Two other key principles are compensation for financial loss and the "equal sharing" principle. The prima facie entitlement to an equal share of the financial fruits of the marriage partnership derives from the parties' past relationship and not their current situation. Unlike an obligation of financial support, therefore, there is no logic which entails that the entitlement should end on the death of either party. The rationale for a sharing award remains applicable even if either or both of the parties dies before a financial order has been made.

123. The position in principle therefore seems to me to be that a claim for a financial order on or after divorce is a cause of action capable of surviving the death of either party, albeit that a party's death is a relevant circumstance which affects the relief that is appropriate. In particular, it may preclude reliance on the needs principle but not the sharing principle.

(3) The interpretation of Part III

124. The question then is whether, even if the claim made by the wife in this case is in its nature capable of surviving the death of either party, Part III of the 1984 Act, properly interpreted, only confers jurisdiction to make a financial order where both parties are living. I agree with Lord Stephens that this is indeed the effect of Part III. I also agree with him that, while the language of Part III contains textual indications to this effect, these are not by themselves conclusive; however, what makes this conclusion unavoidable is consideration of how Part III inter-acts with the statutory regime dealing with family provision on death. I will comment briefly on these points.

Textual analysis

125. Section 12 (the first section of Part III) of the 1984 Act provides that, following an overseas divorce, an application for a financial order under Part III may be made by either "party to the marriage". As Dyson LJ pointed out in *Harb*, at para 34, the fact that a "party to the marriage" is necessarily a living person does not itself prevent a claim made by or against such a person from surviving the person's death pursuant to section 1(1) of the 1934 Act. Unless excluded, section 1(1) of the 1934 Act operates automatically on death to transfer the benefit or burden of a cause of action from a person to their estate. There is therefore generally no need for a statute expressly to provide that a cause of action under the statute is to survive a party's death.

126. This point is illustrated by *Harris v Lewisham and Guy's Mental Health Trust* [2000] ICR 707 (*sub nom Lewisham and Guy's Mental Health Trust v Andrews (decd)*). Under the Race Relations Act 1976 a person who complained that an act of discrimination had been committed against her by her employer was entitled to bring proceedings against her employer in an employment tribunal. There was no express provision in the Act addressing what was to happen on the death of either party. The claimant commenced proceedings complaining of discrimination but died before the hearing. The issue was whether the claim survived for the benefit of her estate. The Court of Appeal, reversing the decision of the Employment Appeal Tribunal, held that it did. It did not matter that there was nothing in the statute which provided for the claim to continue. It was sufficient that there was no provision which prevented a cause of action under the statute from surviving the death of either party by reason of section 1(1) of the 1934 Act. As Stuart-Smith LJ put it, at para 19:

> "The question … is not, as the Employment Appeal Tribunal thought, whether there is anything in the discrimination Acts which expressly confers such rights on the personal representative, but whether there is anything which takes them away."

127. The Court of Appeal also debunked the EAT's reasoning that the claim could not survive the claimant's death because a claim for compensation for discrimination is a right of a purely personal nature. As Mummery LJ pointed out, at para 29, this approach was wrong because:

> "it disregards the fundamental change in the law made by the 1934 Act. The point is not whether the action is 'personal' or whether it is assignable, but whether the person who has died had a 'cause of action'. If he had a cause of action, the benefit of it passed to his estate."

128. By section 13 in Part III, leave of the court is required to make an application for financial relief under Part III. It is unnecessary to consider whether a cause of action could be said to exist before leave is obtained, as in this case both parties were still living when the wife was granted leave to issue her application in August 2017.

129. Section 15 contains "jurisdictional requirements" at least one of which must be satisfied for the court to have jurisdiction to entertain an application under Part III. In summary, the requirements are that either of the parties must have been domiciled or habitually resident in England and Wales for a period of one year ending with the date of the application for leave or with the date on which the divorce took effect; it is also sufficient that at the date of the application for leave either or both of the parties had a beneficial interest in possession in a dwelling-house in England and Wales which was a matrimonial home at some time during the marriage.

130. The respondent argues that, if it had been intended that a claim under Part III could be brought by or against the estate of a deceased person, Parliament would necessarily have expressly referred to the domicile or habitual residence of a party immediately prior to their death, in addition to domicile or habitual residence at the time of the application for leave. I am not impressed by this argument. The evident purpose of section 15 is to require the applicant, as a precondition of the court's jurisdiction to entertain the claim, to establish a sufficient connection with England and Wales. I do not think that the way in which the jurisdictional requirements are formulated would be problematic if the right to make or pursue a claim could survive either party's death.

131. The respondent submits that an arbitrary distinction would arise if a needy applicant who made a claim under Part III before the former spouse died could continue with the claim, whereas an equally (or even more) needy applicant who did not bring the claim before the former spouse died could not do so. In order for this

timing to be critical, however, the case would have to be one in which the connection with England and Wales was tenuous in any event. The circumstances would need to be that: (a) neither party had been domiciled or habitually resident in England and Wales for a year before the divorce; (b) the applicant was not domiciled or habitually resident in England and Wales for a year before the application for leave was made; (c) there was no former matrimonial home in England and Wales in which the applicant had a beneficial interest in possession; but (d) the former spouse had been domiciled or habitually resident in England and Wales for a year at the time of his death - so that his death before the application for leave was made deprived the court of jurisdiction that it would otherwise have had. I cannot see that any great injustice would result from the fact that in such a case the death would prevent the jurisdictional requirements from being met. At all events, to the extent that there would be any injustice, this possibility does not justify interpreting the legislation in a way that produces the far greater injustice that, however great the parties' connections with England and Wales and even if the jurisdictional requirements in section 15 are satisfied in multiple ways when the application for leave is made, the court's jurisdiction is extinguished by the death of either party before the case has been decided.

132. There is more force in the respondent's next point on the language of Part III. Section 16 contains a list of matters to which the court must have regard before making a financial order. The first three of these matters are expressed only in the present tense. They are the connection which the parties to the marriage "have" with, respectively, England and Wales, the country in which the marriage was dissolved or annulled and any other country. This wording presupposes that the parties to the marriage are alive when the order is made.

133. The same can be said of the provisions of sections 17 to 22 which specify (expressly or, in section 17, by reference to sections 23(1) and 24(1) of the 1973 Act) orders which the court may make directing a "party to the marriage" to do something. These provisions differ from section 12, which is concerned with the right to make an application - a right which is capable of surviving death by operation of the 1934 Act. Rather, they are concerned with the types of orders that can be made on the hearing of the application and with who can be the subject of such orders. Taken at face value, the provisions assume that, at the time when an order is made, there is a (living) party to the marriage to whom the order may be directed.

134. It would, however, be within the bounds of linguistic possibility to read these provisions as applying, in the situation where the party to the marriage has died, to the party's personal representative. The decisive point, which in my view rules out such an interpretation, is the one to which I am about to turn.

Inter-relationship with the Inheritance Act

135. Section 25 in Part III makes amendments to the Inheritance (Provision for Family and Dependants) Act 1975 (the "Inheritance Act"). These amendments, in the words of section 25(1), are "designed to give to persons whose marriages are dissolved or annulled overseas the same rights to apply for provision under [the Inheritance Act] … as persons whose marriages are dissolved or annulled under the 1973 Act". In particular, section 25(2) amended the Inheritance Act to enable a person whose marriage was dissolved or annulled overseas to apply after the death of the other party to the marriage for financial provision out of that party's estate. To appreciate the significance of this amendment, it is necessary to understand its legislative history.

136. Section 26 of the Matrimonial Causes Act 1965 gave a former spouse whose marriage with the deceased had ended in divorce, and who had not remarried, a right (which had not previously existed) to apply for an order for maintenance from the deceased's estate. The ground for making such an application was that the deceased had not made reasonable provision for the maintenance of the former spouse after the deceased's death. The right arose only where the deceased died domiciled in England and the divorce had taken place in England and Wales.

137. The Inheritance Act preserved this right and also, in section 14, gave the court power to make more extensive financial provision from the deceased's estate for a divorced former spouse in certain circumstances. The effect of section 14 is to allow the decree of divorce to be disregarded if (a) the other party to the marriage dies within 12 months from the date of divorce and (b) at the time of death no financial order under the 1973 Act has yet been made. Where these conditions are met, the divorced former spouse has the same right under the Inheritance Act as a spouse who is still married at time of death to apply for reasonable financial provision going beyond what is required for his or her maintenance: see section 1(2)(b). The Inheritance Act contained broadly similar restrictions as the 1965 Act, in that a claim by a former spouse under the Act could only be made where (a) the deceased died domiciled in England and Wales and (b) the divorce had taken place in the British Isles.

138. This was the background to section 25(2) in Part III of the 1984 Act. The effect of section 25(2) was to extend the rights available to a former spouse under the Inheritance Act to a former spouse whose divorce had taken place overseas. This amendment only makes sense on the footing it is not possible following an overseas divorce to obtain a financial order under Part III if the other party to a marriage dies before such an order has been made. Had the intention been that an application could be pursued and an order made under Part III notwithstanding the death of the other

party, it would not have been necessary to provide a (lesser) remedy in this situation under the Inheritance Act.

139. Also significant is the limited nature of the remedy provided under the Inheritance Act. It is limited in four main ways. First, as already noted, a claim may only be made under the Inheritance Act if the deceased dies domiciled in England and Wales: see section 1(1). No amendment was made by section 25 in Part III to extend the scope of the Inheritance Act to cases - such as the present case - where the deceased has died domiciled in another country. Second, except where section 14 applies, a claim by a divorced spouse under the Inheritance Act is limited, by section 1(2), to a claim for financial provision reasonably required for maintenance. Third, section 4 of the Inheritance Act imposes a time limit for making a claim of six months from the date on which representation with respect to the estate of the deceased is first taken out. No such time limit applies to an application for a financial order under Part III. Fourth, as the Inheritance Act has been interpreted, a claim made under that Act does not survive the death of the claimant. Even though some of the reasoning relied on to reach this conclusion is open to question (see paras 114-116 above), it must certainly be correct in relation to a claim by a divorced former spouse where such a claim is limited to maintenance, as any requirement for maintenance ends on death.

140. What this shows is that Parliament chose in enacting Part III to give only a very limited right to pursue a claim for financial provision following an overseas divorce after a party to the marriage dies. This right is limited to a claim under the Inheritance Act if certain conditions are met. It would be inconsistent with that legislative choice to interpret Part III as authorising the court to make a financial order under Part III in this situation.

141. The complex interplay between Part III (and the 1973 Act) on the one hand and the Inheritance Act on the other also means that reform aimed at remedying the injustice that results from the limited ability to make a financial order after either party to the marriage has died would require an overall view to be taken of both legislative regimes and of how they do, and should, interact. Only Parliament is competent to undertake that task and to make and implement the policy choices that would be involved. It is not open to this court to cut the Gordian knot and achieve a solution by interpretation of the existing statutory provisions.

Conclusion

142. For these reasons, I agree that the appeal must be dismissed.