Private Client eBriefing

Eternal life, or dead and buried – which claims survive death?

Article by Lemuel Lucan-Wilson, 23rd May 2024

Lois McMaster Bujold once wrote "*the dead cannot cry out for justice. It is the duty of the living to do so for them*". This articles considers how far the living may be able to go - the death of a party to current or potential litigation is not a priority in the grieving process of the loved ones left behind, but it is an aspect of litigation with which lawyers should be familiar.

Pursuant to section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 ("**LR(MP)A 1934**")– "*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*". As a result, most causes of action will survive the death of a claimant, and vest in their estate. Likewise, where a defendant dies, any claims of actions against them survive and can be brought against their estate.

For causes of action which are not complete until damage has been suffered (for example most tort claims) there is also a saving provision in s1(4) LR(MP)A 1934, such if the death happens before or at the same time the *damage* was suffered, a cause of action is deemed to arise. There are also express exclusions; neither a claim under the Fatal Accidents Act 1976 (s1(1A)), nor a claim for defamation (s1(1)) pass for the benefit of the estate.

The list, especially for those operating in the commercial chancery sphere, does not end there. To illustrate this, imagine a couple; Pam and George. Pam and George were married for 24 years, but divorced in 2024 without any application for financial relief on the breakdown of marriage being made. Later in 2024, George died, and Pam had no entitlement under his latest will. Pam dies two months later as the life tenant of a trust, the trustees of which have failed to pay her the income for the last 4 months. Although LR(MP)A 1934 might suggest that all the claims survive, that is not the case.

There are four potential claims to consider here:

1. A claim for ancillary relief or financial remedies,
2. A claim under Inheritance (Provision for Family and Dependents) Act 1975 ("**the 1975 Act**"),
3. A probate claim to challenge George's Will, and
4. A claim for breach of trust against the trustees for failing to pay Pam the income.

The financial remedies claim

For financial remedies claims, *Unger v Ul-Hasan* [2023] UKSC 22 has established that a claim for financial relief following an overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984 ("**the 1984 Act**") does not survive the death of the claimant, *or* the respondent.

Although concerning an overseas divorce, the reasoning in *Unger* is equally applicable to the more usual financial remedies orders made under the Matrimonial Causes Act 1973 ("**the 1973 Act**"). The Court considered that the statutory provisions meant that as between the parties to a marriage, the rights and obligations were purely personal and as a result, under the 1984 Act the claim could not continue once one party to the marriage had died. The jurisdiction which enabled the Court to exercise its discretion when making orders for financial relief required two living parties to the marriage. Nevertheless, the claim was still a cause of action, and the previous authorities which had suggested that it would be a "*mere hope*" were incorrect.

The Court based a significant amount of its reasoning regarding the unavailability of financial relief claims on the fact that, were such claims possible, it would undermine much of the requirements of the 1975 Act. Notably, if financial claims survived then amendments to the 1975 Act in 1984 to allow those divorced outside of the UK to make a claim under the 1975 Act would have been unnecessary; there would be a duplication of routes to the same relief; and, claimants could avoid the time limit of the 1975 Act, or make an application under the 1984 Act when they could have been prevented from doing so under the 1975 Act since the respondent was not domiciled in the UK.

As a result, even when George died, Pam lost her ability to make a claim for financial relief on George's estate.

The 1975 Act claim

On George's death, Pam might then have a claim under the 1975 Act. Under that Act, if a party to the marriage dies within a year of the decree of divorce, then under s14(1) the Court has the power to consider the applicant as if they were the spouse of the deceased, as opposed to the former spouse. Pam's claim is therefore subject to the so-called divorce

cross-check and not limited to her reasonable maintenance, and therefore potentially very valuable if it survives for the benefit of her estate.
In *Unger*, the Supreme Court's reasoning was on all on the basis that, where the respondent to a divorce claim had died, the jurisdiction under the 1975 Act was engaged such that there needed to be parity between the ancillary relief requirements and the 1975 Act.

What the Supreme Court was not considering in great detail was what would happen when the *claimant* or potential claimant to a 1975 Act claim dies. Prior case law had decided that the claim did not survive because it was not a cause of action. Equally, as the Supreme Court did not accept this as a correct characterisation of a claim for ancillary relief on divorce, there was at least a possibility that this rationale would mean that a 1975 Act claim *did* survive.

This point was considered in *Archibald v Stewart* [2023] EWHC 2515, which noted that the idea there was no cause of action was "*heresy*" in *Unger*, but agreed that, analogous to a claim for ancillary relief, a claim under the 1975 Act would be personal to the applicant and could not be continued by the personal representatives of the applicant.

As such, Pam's PRs will get no assistance from such a claim, despite its potentially significant value. This does however, mean that there is parity between a claim for financial remedies and a claim under the 1975 Act – if a 1975 Act claim could survive the death of the claimant, this would draw into question why the same could not be said for a divorce. Moreover, for non-spouses the question is much less likely to arise because the claimant is limited to their maintenance, which at least *prima facie* would suggest no discretionary award should be made, since they no longer need to be maintained.

The probate claim

Where then, does that leave Pam's heirs? In this example, the chain may just end – upon the divorce of Pam and George, George's last Will would be treated as if Pam had died when the marriage was divorced – section 18A Wills Act 1837, unless a contrary expression is stated. For Pam's heirs, invalidating that will may provide little benefit (since the same would apply to any earlier wills) and Pam is not entitled on intestacy.

Assuming however, that there was a previous will which did express a contrary intention, Pam's PRs would need to show that they had standing to make a probate claim. The test for standing is whether the claimant in question has an interest in the estate - CPR 57.7. Although expressed as requiring the claimant to *state* their interest, in case law this provision has been interpreted as requiring the claimant to have a sufficient interest in the estate - *Randall v Randall* [2016] 3 W.L.R. 1217. In our case, Pam's personal representatives would have an interest in George's estate if a prior will meant that Pam's estate might be entitled to receive some of the proceeds.

The CPR 57.7 test can be quite wide. This reflects the fact that the Court is sitting in a quasi-inquisitorial function, and does not give litigants the usual tools. Default judgment does not apply; CPR 57.10, nor does the claimant have a generally unqualified right to discontinue; see CPR 57.11 which disapplies all of CPR Part 38. There is also authority that suggests claims can go ahead even where there is no suitable interest, but where the Court has concerns in relation to the validity of the Will in question, as was the case in *Green v Briscoe* [2005] EWHC 809 (Ch). Similarly, a creditor of a beneficiary of an estate may also have sufficient interest to bring a probate claim under CPR 57 if they will be affected by whether the Court approves the will put forward for proof – *Randall*.

The breach of trust claim

Finally, we have Pam's claim to the income that should have been paid, and has not been due to breach of trust.

Uncontroversially, a claim against a trustee survives their death and the beneficiaries are entitled to claim against the trustee's estate since a trustee is personally liable for their breach of trust. Further, where the claimant beneficiary dies before pursuing their claim for breach of trust, this survives for the benefit of their estate. This was accepted by the Court of Chancery as settled law in *Sandford v Jodrell* (1854) 2 Sm. & G. 176, 65 E.R. 354 where it was widened to allow a suit by a legatee of the deceased in those specific circumstances, and accords with the provisions of LR(MP)A 1934; the beneficiary will have had a cause of action prior to their death which then passes on to their PRs.

The benefit of such a claim will however, depend on the circumstances – if a beneficiary would be maintaining a claim for equitable compensation because of their personal losses (such as the failure to abide by percentages in a fixed trust), the claim is one which it might be useful for their PRs to progress. Pam's claim to the income due to her would also fall into this category. If there is no such direct link the claim might be of limited value to the Estate. For example, a claim to undo a trustee decision which increases the fund which is subject to the trustee's discretion is to the benefit of all beneficiaries generally but may not provide any significant assistance to the deceased's estate. Any future exercise of that discretion will have of course take into account the fact that the beneficiary has died. Moreover, if proceeds are paid into the estate of the beneficiary, they will likely be subject to Inheritance Tax, which could be avoided by paying those proceeds directly to those who would benefit if they are also beneficiaries under the trust.

Conclusion

For many domestic disputes, lawyers should be aware that the claims which are likely to be the most valuable do not survive the death of a claimant, despite what the statute may suggest. Specialist advise should therefore be sought on the best way to ensure that client's interests are protected, especially if they are in ill health.

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