

## Supreme Court considers proceedings under the Matrimonial and Family Proceedings Act 1984 after the death of a party (Unger and another (in substitution for Hasan) v UI-Hasan (deceased) and another)

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**Family analysis:** In *Unger and another (in substitution for Hasan) v UI-Hasan (deceased) and another*, the Supreme Court considered a former wife's application under Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984) against her former husband, who had died before the application could be adjudicated. The court considered whether the rights under MFPA 1984 read with the Matrimonial Causes Act 1973 (MCA 1973) were purely personal rights which could only be adjudicated between living parties and which would therefore mean the wife was incapable of proceeding against the Husband's estate, and whether a claim for financial relief under MFPA 1984 is a cause of action which survives against the estate of a deceased spouse under the Law Reform (Miscellaneous Provisions) Act 1934 (LR(MP)A 1934). Philippa Davies, Senior Associate, and Anna Shadbolt, Partner at Dawson Cornwell, who acted for the appellant, consider the issues.

*Unger and another (in substitution for Hasan) v UI-Hasan (deceased) and another* [\[2023\] UKSC 22](#), [\[2023\] All ER \(D\) 93 \(Jun\)](#)

### What was the background?

The husband and wife, a Pakistani couple, were married for roughly 25 years. They divorced in Pakistan in 2012. The wife brought a claim for financial remedies under [Part III](#) of the Matrimonial and Family Proceedings Act 1984 ([MFPA 1984](#)). At this time, the wife was habitually resident in England. The proceedings were long and convoluted, spanning some five years, primarily due to various interim hearings focussed on the husband's disclosure. They were ultimately scheduled to conclude by way of a final hearing in February 2021. However, the husband died three weeks before the hearing. He was not domiciled in England and Wales at the date of his death and so it was not open to the wife to bring a claim against his estate under the [Inheritance \(Provision for Family and Dependents\) Act 1975 I\(PFD\)A 1975](#)). Therefore the only way in which she could obtain financial relief was if her claim under [MFPA 1984](#) survived the death of the husband.

The matter was heard at first instance before Mr Justice Mostyn in the High Court (*Hasan v (1) UI-Hasan (deceased) and another* [\[2021\] EWHC 1791 \(Fam\)](#), [\[2022\] 1 FLR 1033](#)) who considered that the wife's claim for financial relief against the husband was vested in her and that on his death, her claims survived against his estate under [LR\(MP\)A 1934, s 1\(1\)](#). When delving into the history and development of the law on financial relief, the distinction was drawn between the position as it was when this orthodoxy came into being—cases heard long ago when wives were typically entitled to no or limited financial provision, and the position now, following a clear expansion of such rights (first maintenance, then capital, then rights justified by the sharing principle), whereby spouses are arguably entitled to claim financial relief against a spouse or their estate, rather than this being a mere hope.

However, Mostyn J determined that he was bound by the authority of the Court of Appeal decision in *Sugden v Sugden* [\[1957\] 1 All ER 300](#) and so, even though he considered that the decision in *Sugden* was wrong, he was required to follow it. Unusually, Mostyn J granted a certificate under [section 12\(1\)](#) of the Administration of Justice Act 1969 enabling the wife to apply directly to the Supreme Court for leave to appeal, in other words, to 'leapfrog' over the Court of Appeal, as the Court of Appeal would also be compelled to follow its previous decision in *Sugden*. Permission to appeal was granted.

The wife passed away before the appeal was heard. Her personal representatives were granted permission to continue the appeal in her stead.

## What did the court decide?

The question with which the Supreme Court was faced was whether, where one of the parties to an application for financial remedy under [MFPA 1984](#) has died, further proceedings can be taken. There were two issues for the Supreme Court to consider:

- whether the rights under [MFPA 1984](#) read with the [MCA 1973](#) were purely personal rights which could only be adjudicated between living parties and which would therefore mean the wife was incapable of proceeding against the husband's estate, and
- whether a claim for financial relief under [MFPA 1984](#) is a cause of action which survives against the estate of a deceased spouse under [LR\(MP\)A 1934](#)

The lead judgment was given by Lord Stephens, and with which Lord Hodge, Lord Hamblen and Lord Burrows agreed. A further judgment was given by Lord Leggatt, which concurred with Lord Stephens and with which Lord Hodge, Lord Hamblen and Lord Burrows also agreed.

The question of whether a claim can survive the death of a spouse was examined in the case of *Barder v Barder* [\[1987\] 2 All ER 440](#), [\[1987\] 2 FLR 480](#). This authority had been considered by Mostyn J at first instance. Lord Stephens found that Mostyn J had not considered correctly the second question in *Barder* which was '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'.

Lord Stephens considered 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'.

The orthodox understanding was that orders for financial provision on divorce can only be made by a court between living parties, and that is also supported by the provisions contained in [I\(PFD\)A 1975](#). Lord Stephens also commented that the Law Commission reports prior to [I\(PFD\)A 1975](#) set out that the statutory construction of [I\(PFD\)A 1975](#) was such as to avoid two different routes being created to claim financial relief after the death of a spouse. Lord Stephens further commented that Parliament would have been aware of the orthodox understanding when enacting [MCA 1973](#), [I\(PFD\)A 1975](#) and [MFPA 1984](#). The Supreme Court found that, on the true construction of the relevant statutory provisions in [MFPA 1984](#) and [MCA 1973](#), personal rights and obligations are created which can only be adjudicated between living parties. Consequently, the wife's appeal was dismissed.

The second issue before the Supreme Court did not arise for determination as the court found, as above, that personal rights can only be adjudicated between living parties.

Ultimately the Supreme Court has ruled that under the existing law, a divorcing spouse cannot continue a claim for financial remedy if the other spouse has died. Lord Stephens concluded his judgment by saying that there may be a case for reform in this area, but to do so would be a matter for Parliament not for the courts.

Lord Leggatt added further observations in his judgment about the defect in the current law which was highlighted by Mostyn J's judgment at first instance. Lord Leggatt commented that the dismissal of the wife's financial remedies claim was an injustice as, to take this step, is to prevent a court from making a fair division of matrimonial assets which then has the effect of one party's estate gaining unfairly as against the other. Lord Leggatt commented, as Lord Stephens had done, that only Parliament can enact a reform to remedy the injustice that results from the limited ability to make a financial order after either party has died and that a review would need to be undertaken of [MFPA 1984](#), [MCA 1973](#) Act and their interplay with [I\(PFD\)A 1975](#).

## What are the practical implications of this case?

The law has not changed so financial remedy cases will be dealt with in the same way as previously ie the death of a party extinguishes the claim. However, there are two areas of potential uncertainty created by this judgment. Firstly, the operation of *Barder*. *Barder* makes clear that there is jurisdiction to make a financial

order after the death of a party, but the Supreme Court simply stated that *Barder* is a 'limited exception [which] is not a sufficient basis on which to undertake a radical change to the construction of matrimonial legislation'. It is unknown what would happen if an order was set aside for reasons other than the death of a party, for example if non-disclosure was discovered following determination of the other party's sharing claim only to be followed by the death of the non-disclosing party. Would the surviving party be prohibited from pursuing the claim? The discrete exception reasoning relied on by the Supreme Court arguably sits uncomfortably with the existing *Barder* authority.

Secondly, the judgment has drawn attention to the potential injustice created by the interplay between [MFPA 1984](#) (and [MCA 1973](#)) and [I\(PFD\)A 1975](#) in circumstances where the deceased party is not domiciled in England and Wales or where the divorce was more than twelve months before the death of the deceased. The wife was prevented from pursuing a claim under [I\(PFD\)A 1975](#) for both of these reasons. I(PFD)A, ss 14 and 14A do not provide an avenue for a spouse in such circumstances to make a claim for financial relief against the deceased spouse's estate. Further, in circumstances where a surviving spouse wishes to make the equivalent of a sharing claim in divorce against a deceased spouse's estate under [I\(PFD\)A 1975](#) but the spouse dies before the claim is determined, would the estate be able to pursue the claim? Is a claim under [I\(PFD\)A 1975](#) purely personal and dies on the death of the claimant or is it capable of being pursued by the claimant's estate? As mentioned above, Lord Leggatt commented on the injustice caused by the restrictions on the ability to make a financial order post-death of a spouse.

These points call into question the fairness of the restrictions imposed by existing statutes on the right to financial remedies upon divorce in today's society. They further cast doubt on the extent to which the orthodox application of such law is suitable. The Law Commission is due to examine these half-century old laws on finances after divorce and it is hoped that the thorny issues presented by *Unger and another* will be examined.