Neutral Citation Number: [2023] EWHC 2515 (Ch)

Case No: PT-2022-0004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (Ch D)

Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 12 October 2023

Before:

DEPUTY MASTER FRANCIS

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Between:

(1) THE ESTATE OF NEIL DOUGLAS ARCHIBALD deceased
(2) JULIE ANN ARCHIBALD **Claimants**

- and –

(1) ALISTAIR JAMES STEWART
(2) GEORGE RICHARD JORDAN **Defendants**
(personal representatives of Rosemary Archibald deceased and Malcolm Archibald deceased)

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The Second Claimant, Julie Ann Archibald, in person, acting for herself and as representative of the estate of Neil Douglas Archibald, **the First Claimant**
Timothy Sherwin (instructed by **Roythornes LLP**) for the **Defendants**

Hearing date: 26 September 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30 am on 12 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Deputy Master Francis

Introduction

1. This is my determination of certain preliminary issues arising in claims under the Inheritance (Provision for Family and Dependants) Act 1975 brought by Neil Archibald, and by his wife, Julie Archibald, in respect of the estates of Neil's late parents, Rosemary Archibald and Malcolm Archibald[1].

2. Those issues, as they were directed by Chief Master Shuman by her order of 18 April 2023, are:-

   a) whether Julie has standing under section 1 of the 1975 Act to bring any claim in her own right to reasonable financial provision in respect of either of the two estates; and

   b) whether permission should be granted to Neil and Julie to bring their claims against either of the estates out of time under section 4 of the 1975 Act.

3. Very sadly, Neil himself died on 25 June 2023. Julie seeks to continue his claim on behalf of his estate. This gives rise to a further issue which I now have to determine as to whether Neil's claim for reasonable financial provision survives his death and can be pursued by his estate.

4. I made an order at the outset of the hearing that Julie should be appointed to represent Neil's estate pursuant to CPR r.19.12. She appeared in person in what must have been difficult circumstances given the recent death of her husband. However she was able to describe to me a detailed account of the lives of her parents-in-law, and Neil's and her own relationship with them, and explained to me as best she could her position on the three issues which I had to determine.

5. I must also record my gratitude to Mr Timothy Sherwin, who appeared for the defendants, the executors and trustees of Rosemary and Malcolm's estates and will trusts, for his comprehensive skeleton argument, and balanced presentation of the underlying legal issues and case law.

Background

6. Rosemary and Malcolm were the adoptive parents of Neil and his younger brother Mike. Rosemary died on 10 June 2014. Malcolm died on 14 January 2021.

7. Neil was married to Julie in 1999, after they had met in 1995. They have two children, Sasha and Ross, both now young adults. Julie also has a child from a previous relationship, Aaron. Neil suffered from alcoholism, and was unwell for some time before his death. He and Julie had separated for a short period in 2018 but were reunited in 2020.

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[1] For convenience, I shall refer to the family members by their given names in this judgment, without intending any disrespect thereby.

8. Mike was married, and has two children, McKenzie and John, now in their late teens. He has also suffered problems of addiction during his adult life. Neil was estranged from him for many years.

9. Rosemary and Malcolm both made wills in similar terms on 26 May 2009, although Rosemary made a codicil shortly before her death on 23 May 2014.

10. Under the terms of her last will and codicil, Rosemary appointed the defendants, and Malcolm, to be her executors and trustees. After providing for three small legacies, she left her residuary estate on discretionary trust for three classes of beneficiary, namely (a) her husband, (b) her children and other descendants, and (c) the spouses or civil partners of her children and descendants, with the income of the trust to be paid to her husband during his lifetime.

11. Under his will, Malcolm similarly appointed the defendants as his executors and trustees. He left pecuniary legacies of £10,000 to each of his four grandchildren, and £3000 to his step-grandchild, Aaron. He left his residuary estate on similar discretionary trusts to those declared under Rosemary's will.

12. Rosemary and Malcolm had prepared a joint letter of wishes on 13 December 2002 setting out how they wanted their trustees to exercise their discretionary powers under the will trusts of their residuary estates after they had both died[2]. This expressed the desire that their trustees should pay sums of £250,000 outright to each Neil and Mike, but that the remainder of their estates should be held to apply the income, and capital if necessary, for the education and training of their grandchildren, with the remaining capital distributable between the grandchildren after they had reached the age of thirty. They also asked that in the event of the death of either son leaving a surviving spouse the trustees should make income provision for such spouse to ensure their welfare and which would also sustain their grandchildren, for instance by the provision of a home and supporting income, but not any capital provision.

13. Following Rosemary's death, probate of her last will and codicil was granted to the defendants on 5 September 2014, with power reserved to Malcolm. The net value of her estate on death was £1,534,542, the vast bulk of which was represented by her one-half share in her and Malcolm's marital home known as Tideways, in Birdham, near Chichester. Her estate was fully administered by early 2015, as shown in the final estate accounts dated 22 January that year, with the residue vested in the defendants as trustees of her will trust, from which they made immediate payments by way of capital provision of £20,000 to each of Neil and Mike.

14. By the time of Rosemary's death, Malcolm was suffering from dementia. He had previously executed an enduring power appointing as his attorneys Alistair Stewart, the first defendant, then a partner at Plummer Parsons chartered accountants, and Amanda King Jones, a partner at Thomas Eggar, and this was registered in January 2015. Over the next six years until his death, those attorneys managed his affairs, and arranged for his care, initially at his home but in the last year of his life in a nursing home, utilizing the income from Rosemary's will trust. Their role caused some ill-feeling on Neil and Julie's part as

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[2] This letter of wishes had been prepared in respect of discretionary trusts which they had provided for under previous wills made in 2002 but it continued in effect in relation to the trusts created under their last wills.

they felt they had no say in his care. Neil was also unhappy about payments made by the attorneys to Mike for his maintenance, about which he made a complaint to the Office of Public Guardian in 2015, resulting, I am told, in an instruction that no further such payments should be made to either son.

15. After Malcolm's death, probate of his last will was granted to the defendants on 23 May 2021, following a limited grant *ad colligenda bona defuncti* which had been made to them in March that year to facilitate the sale of Tideways. The net value of his estate at death was £842,570. As shown in the draft estate accounts drawn up to 13 June 2022, his estate has been largely administered, with the balance available for distribution after payment of tax and administration expenses amounting to £534,817, of which £55,000 is required to meet pecuniary legacies and the remaining £479,817 to be held on the terms of his will trust.

16. Neil was engaged in on-going correspondence with the defendants following the grant of probate in matters relating to the administration of Malcolm's estate (and in particular the fate of his and Rosemary's personal chattels including a number of paintings of sentimental as well as artistic value), and relating to the exercise of the defendants' discretionary powers under the will trusts. In this latter respect, the defendants agreed to make an immediate balancing payment out of capital of £20,000 to Neil in July 2021 reflecting the benefits which Mike had already received from the trusts by having been allowed for a period to occupy Tideways rent free. However, without reaching any final decision on the question, they were more resistant to Neil's request that the entire capital of the trust funds should be divided between Neil and Mike's families, and his family's share paid out immediately to him for him to administer for his family's benefit.

17. In due course, in September 2021, Neil instructed Anthony Gold solicitors to take up matters on his behalf, and that firm wrote to the defendants on 14 October 2021 requesting information relating to the administration of both estates, and details of any further distributions to be made to Neil, to which the defendants' solicitors, Gateley Legal, responded on 26 October 2021. By letter of 4 November 2021 Anthony Gold sought further information, including a breakdown of the fees charged to the estates by the defendants and details of how they intended to exercise their discretionary powers under the will trusts, and reasons for that, to which Gateley responded on 3 December 2021. On 9 June 2022, Anthony Gold, by now acting for Julie as well, wrote again; in an indication of what seems to have been a deteriorating relationship, they intimated, amongst other things, a challenge to the defendants' fees in acting as executors and trustees. However, in none of such correspondence was there any suggestion that Neil or Julie intended to bring, or were contemplating, any claim in respect of either of the estates under the 1975 Act.

18. By this stage the administration of Malcolm's estate was more or less complete, barring payment of the legacies. On 15 July 2022, Richard Jordan, the second defendant, wrote to Anthony Gold setting out how the defendants were proposing to exercise their discretionary powers under the two will trusts following the conclusion of the administration of Malcolm's estate, and after having engaged in discussions with Neil and Julie, and their daughter. In essence, they proposed dividing the trust assets equally between the two – Neil and Mike's - sides of the family, providing a fund of just over £500,000 for each side. Neil's family fund would be used to make immediate capital provision, comprising half the fund, for Sasha, with the remaining half to be invested on life insurance bond to pay the

income for Neil for life with balance going to Ross on his death. The letter went on to explain the rationale for such proposals as follows:-

"*... the Trustees wish to preserve the majority of the wealth for the long term benefit of the grandchildren, whilst ensuring that no harm or misfortune shall befall either of Rosemary's and Malcolm's two sons. We are conscious of the amount of cost that has been incurred by the sibling rivalry and the administration of these trusts to date and believe that this amicable solution also brings an end to that episode.*"

19. The defendants invited Neil and Julie's further input on the proposals before any final decision was made. Anthony Gold replied to advise that they were seeking instructions on 27 July 2022, but no substantive response followed. In early September 2022 they advised that they were no longer instructed.

The claim and directions for determination of the preliminary issues

20. On 6 October 2023, Neil and Julie issued the present claim seeking reasonable provision from both estates under the 1975 Act. No letter of claim had previously been sent, or any other indication that a claim under the 1975 Act was contemplated.

21. The claim form itself set out the complaints which had led to the issue of claim in the Details of Claim and these were amplified in an accompanying "Statement of Fact" in Neil's and Julie's joint names. It is evident from these documents that they had brought the claim because they were disappointed with the way in which the defendants as trustees were proposing to exercise their discretionary powers under the will trusts, making little or no capital provision for Neil and Julie themselves, and instead making provision for their children direct, due, it was alleged, to Neil's life-limiting condition and their antipathy to Julie. The following passage from their statement provides a flavour:-

"*We allege that Neil is being discriminated against due to his disability, and that Julie his wife, is being Victimised. Human rights are arguably being compromised based on UK Law giving Trustees Full scope to deny Family inheritance by manipulating a bias of clever evasive wording favouring themselves, based on their own opinions this in turn denies families their inheritance, this could be argued as discriminatory in nature. On closer inspection it is suggested that UK Law on Trusts is flimsy, scant and vague, i.e. Letter of Wishes on Discretionary Will Trusts are not legally binding. Both Malcolm and Rosemary left Letter of Wishes which have been totally ignored.*"

22. The claim form included an application for permission to bring the claim out of time, but did not set out the basis on which such permission was sought. Nor did it identify the basis on which Julie had standing to bring a claim in her own right. Beyond the complaint as to the manner in which the defendants as trustees proposed to exercise their discretionary powers, it did not set out the grounds why it was alleged that Rosemary or Malcolm had not by their wills made reasonable financial provision for Neil or Julie, or provide any details of the factors under section 3 (1) of the 1975 Act on which they relied.

23. In response to the defendants' criticisms as to such lack of detail, Neil and Julie served a further statement dated 18 November 2022 in which they explained that they did not seek to contest the provision which was being made under the will trusts for their children, but objected to the continuing role of the defendants, and wished to see the trusts wound up.

They complained that they had not previously been advised properly, and had not wanted to upset the arrangements under Rosemary's will trust which provided the income to pay for Malcolm's care. But the statement did not address other deficiencies of which the defendants complained in setting out the basis of the claim, and particulars relied upon.

24. By his order dated 4 January 2023 made at the first directions hearing, Deputy Master Rhys required Neil and Julie to rectify these deficiencies by serving a further witness statement by 15 February 2023. They did so, by a statement once again in their joint names, dated 12 February 2023. I shall return to the details of this in due course, but note at this stage that Julie's standing to bring a claim in her own right was said to arise under section 1 (1) (d) of the 1975 Act, as someone treated by the deceased as a child of the family.

25. At a further directions hearing on 18 April 2023, Chief Master Shuman directed that the issues whether permission should be granted to bring the claim out of time, and as to Julie's standing, be determined as preliminary issues, with provision for the defendants to serve any evidence by 1 August 2023 and Neil and Julie to serve any evidence in response by 29 August 2023. Mr Jordan duly made a statement dated 23 May 2023, dealing largely with the defendants' dealings with Neil and Julie following Malcolm's death. Julie served her own statement in reply on 27 August 2023, announcing Neil's death and her wish to continue his claim on behalf of his estate.

The first issue: does Neil's claim under the 1975 Act survive his death?

26. Before considering the authorities on this question, I should make some observations on the provisions of the 1975 Act itself, which are on their face inconsistent with any claim under the Act by a child of the deceased being capable of being pursued, or at any rate succeeding in any respect, following such claimant's death.

27. Under section 1 of the 1975 Act, a claim may be brought by an applicant, falling within any one of six categories of relationship to the deceased, on the basis that the disposition of the deceased's estate effected by will or the intestacy rules is not such as to make reasonable financial provision for such applicant. Where the court is satisfied of this, it may make an order for such provision under section 2. In determining the questions whether reasonable financial provision was made, and if not, whether and what such provision should be ordered under section 2, the court is required to have regard to the matters set out in section 3. For these purposes:-

    a) "*reasonable financial provision*" is defined in section 1 (2) (b) in claims other than those by the spouse or civil partner of a deceased as "*such reasonable provision as it would be reasonable in all the circumstances of the case for the application to receive for his maintenance*"; this is in contrast to claims by spouses or civil partners of the deceased, where such provision is defined (under section 1 (2) (a) and (aa)) as "*such provision as it would be reasonable in all the circumstances of the case for a [spouse / civil partner] to receive, whether or not that provision is required for his or her maintenance*";

    b) the factors to which the court must have regard under section 3 include ones concerning the personal circumstances of the applicant, including:-

i) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future (subsection (1) (a)), taking into account his or her earning capacity, and financial obligations and responsibilities to others (subsection (6)); and

ii) any physical or mental disability of the applicant (subsection (1)(f));

c) in considering the matters of which the court is required to have regard under section 3 it must (under subsection (5)) take into account the facts as known to the court at the date of the hearing.

28. On death, an applicant plainly no longer has any maintenance requirements for which provision should reasonably be made. And the matters to which the court is required to have account under section 3 (1) (a) and (f) fall away, rendering unworkable, or at any rate skewing substantially against the applicant, the balancing exercise provided for under section 3. These are compelling reasons why, as a matter of construction of the 1975 Act, any claim thereunder can only be pursued during the applicant's lifetime, and, *a fortiori*, a claim by an applicant other than the spouse or civil partner of the deceased.

29. I turn then to the authorities. I was referred to three High Court decisions in which it has been held that claims under the 1975 Act do not survive the death of the applicant, in chronological order: *Whyte v Ticehurst* [1986] Fam 64, a decision of Booth J; *Re Bramwell deceased* [1988] 2 FLR 263, a decision of Sheldon J; and *Roberts v Fresco* [2017] EWHC 283 (Ch), [2017] Ch 433, a decision of Simon Monty QC.

30. All these decisions depended in part on the application of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934, a provision which was enacted to override the common law rule that causes of action did not survive the death of the person in whom they were vested. Section 1 (1) of that Act provides, so far as material, as follows:-

> *"(1) Subject to the provisions of this section, 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."*

In each case, the judge held that an applicant's right to bring a claim under the 1975 Act was not in itself a cause of action, within the meaning of the 1934 Act, but a mere hope or contingency. That was because it was only after an order had been made in favour of an application for reasonable financial provision that any cause of action came into being and was vested in the applicant, so as to be capable of surviving his or death. In analyzing a claim under the 1975 Act in this way, the judges followed, and applied by analogy, the reasoning of Denning LJ in *Sugden v Sugden* [1957] P 120, in which he had stated *obiter* (at p. 134) that the right to bring a claim for financial relief on divorce under the Matrimonial Causes Act 1933 did not give rise to any cause of action until the court makes an order directing such relief.

31. This analysis of the right to bring a claim for financial relief under matrimonial legislation as a mere hope or contingency, rather than a cause of action, has been swept away as a heresy by the Supreme Court in its recent decision in *Unger v Ul-Hasan* [2023] UKSC 22; [2023] 3 WLR 189. In his judgment at [115 - 116] Lord Leggatt said this:-

"115… As reflected in the decisions of the House of Lords in White v White [2001] 1 AC 596 and Miller v Miller [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 …

"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."

32. Nevertheless, as Mr Sherwin explained, the decisions in *Whyte*, *Bramwell* and *Roberts* all relied also on a second strand of reasoning which is unaffected by the Supreme Court decision in *Unger*. This was that the nature of a claim under the 1975 Act, as likewise a claim for financial relief under the matrimonial Acts, is, on a proper construction of the Act, one purely personal to the applicant and incapable of being further pursued following his or her death. Booth J said this in *Whyte*, at p. 70A-E:-

"*Further, in my judgment, both the Matrimonial Causes Act 1973 and the Inheritance (Provision for Family and Dependants) Act 1975 by their explicit terms and by the very purposes for which they were enacted restrict the claim for financial relief to a spouse or surviving spouse. I do not think that by extending the power of the court to grant such relief to a surviving spouse Parliament intended to create a cause of action which in so far as it related to provision not required for maintenance would survive for the benefit of his or her estate. As, Mr Taylor has observed, if that were to be the case the provisions of the Inheritance (Provision for Family and Dependants) Act 1975 would enable claims to be made which had different legal effects: on the one hand, a claim for maintenance personal to the survivor which would die with him and on the other a claim, limited to the surviving spouse and open to no other applicant, for financial relief beyond that required for maintenance which would survive him for the benefit of his estate. In my judgment there is nothing to show that Parliament intended such a situation to arise. It would indeed lead to the extraordinary result, as in this case, of a contest between the beneficiaries of two estates in the determination of which the court would have the well-nigh impossible task of assessing the matters to which the statute requires it to have regard, many of which are clearly based upon the fundamental assumption that one of the parties to the marriage survives at the date of the hearing*."

Sheldon J in *Bramwell* at p. 268, and Simon Monty QC in *Roberts* at [44] both adopted similar reasoning in concluding that a claim by a surviving spouse to reasonable financial provision under the 1975 Act was, on a proper construction of the Act itself, merely personal to the applicant.

33. As I have already observed above, that reasoning applies, *a fortiori*, to claims by other classes of applicant whose right to relief is limited to such reasonable financial provision as is required for their maintenance.

34. In *Unger* the Supreme Court held that on a proper construction of the relevant provisions of the Matrimonial Causes Act 1973 and the Matrimonial and Family Proceedings Act 1984, the rights and obligations to the parties to a marriage to financial relief created thereunder were personal to those parties and ended with either of their deaths, even though the right to such relief was properly to be regarded as a cause of action within the meaning of the 1934 Act. In support of such a construction, Lord Leggatt expressly acknowledged

the decisions referred to above on the proper construction of the 1975 Act. He said this at [139]:-

"*Fourthly, 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.*"

35. Accordingly, in my judgment, it is clear that a claim by a child of the deceased under the 1975 Act does not survive his or her death. On a proper construction of the 1975 Act, such a claim is personal to the applicant and can only be pursued whilst the applicant is alive. That conclusion is supported by the authorities I have referred to, the correctness of which as regards the question of the proper construction of the 1975 Act is unaffected by the Supreme Court decision in *Unger*.

The second issue: Does Julie have standing to bring a claim under the 1975 Act?

36. Julie brings her claim against the estates of Rosemary and Malcolm under section 1 (1) (d) of the 1975 Act as a person treated by each of them as a child of the family.

37. The provisions of section 1 (1) (d), and the accompanying provisions of section 3 (3) as they apply to claims under that sub-paragraph were amended in respect of deaths occurring after 1 October 2014 by the Inheritance and Trustees' Powers Act 2014. As Rosemary's death occurred before that date, and Malcolm's after, it is necessary to consider both versions.

38. As it applies to Rosemary's estate, section 1 (1) (d) is in the following terms:-

"*Any person (not being a child of the deceased) who, in the case of any marriage or civil partnership to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage or civil partnership*."

Section 3 (3) then provides:-

"(3) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(c) or 1(1)(d) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the manner in which the applicant was being or in which he might expect to be educated or trained, and where the application is made by virtue of section 1(1)(d) the court shall also have regard -

(a) to whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and the basis upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;

(b) to whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child;

(c) to the liability of any other person to maintain the applicant."

39. As it applies to Malcolm's estate, section 1 (1) (d) is in the following terms:-

    "*Any person (not being a child of the deceased) who in relation to any marriage or civil partnership to which the deceased was at any time a party, or otherwise in relation to any family in which the deceased at any time stood in the role of a parent, was treated by the deceased as a child of the family*".

    A new section 1(2A) then provides that:-

    "*The reference in subsection (1)(d) above to a family in which the deceased stood in the role of a parent includes a family of which the deceased was the only member (apart from the applicant)*."

    And section 3 (3) is amended, so that in applications under section 1 (1) (d) the court is directed to have regard to the following factors:-

    "*(a) to whether the deceased maintained the applicant and, if so, to the length of time for which and basis on which the deceased did so, and to the extent of the contribution made by way of maintenance;*

    (aa) to whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant;

    (b) to whether in maintaining or assuming responsibility for maintaining the applicant the deceased did so knowing that the applicant was not his own child;

    (c) to the liability of any other person to maintain the applicant."

40. The amendments are relevant in considering Julie's claim as against Malcolm's estate to the extent that it makes clear that:-

    a) the quasi-parent child relationship is one which could have been established either before Rosemary's death, or after her death, notwithstanding that Malcolm was then sole surviving parent of the family; and

    b) the question whether Malcolm assumed responsibility for Julie's maintenance is a relevant consideration in assessing whether she was treated by him as child of the family, but is not (and indeed never was) a threshold condition; the question whether he did in fact maintain her, and, if so, for what period, to what extent and on what basis must also be considered, regardless of any assumption of responsibility.

41. Mr Sherwin referred me to passages from the Law Commission's report *Intestacy and Family Provision Claims on Death* (Law Com. No 331) which recommended the amendments to section 1 (1) (d) and 3 (3) which were made by the 2014 Act as a guide to the application of the amended provisions. In paragraph 6.38 of its report, the Law Commission dismissed concerns that the amended provisions may be interpreted in too far reaching a way as fanciful:-

"*A court would not find that a child who was simply sponsored by the deceased or with whom the deceased undertook voluntary work was treated as a child of the family, unless the quality and intensity of that help could be characterised as parental. Nor would simply helping an elderly neighbour, without much more, merit such a description*."

42. There are only two reported decisions of the courts on the application of section 1 (1) (d). In *In re Callaghan, decd* [1985] Fam 1, Booth J held that the sub-section applied not only to minors who were treated as a child of the family, but also an adult so treated, in that case the adult step-child of the deceased. She explained, at p. 6 A-B, that the key question was the nature of the relationship between the applicant and the deceased:-

"*It is again a matter concerning the nature of the relationship between the deceased and the applicant, and it does not follow that treatment necessarily refers to the treatment of the applicant by the deceased as a minor dependent child. In this case the acknowledgement by the deceased of his own role of grandfather to the plaintiff's children, the confidences as to his property and financial affairs which he placed in the plaintiff and his dependence upon the plaintiff to care for him in his last illness are examples of the deceased's treatment of the plaintiff as a child, albeit an adult child, of the family. All these things are part of the privileges and duties of two persons who, in regard to each other, stand in the relationship of parent and child.*"

43. In *In re Leach, decd* [1986] Ch 226, the Court of Appeal was concerned again with a claim by an adult step-child. In his judgment, Slade LJ posed the question what was the nature of the behaviour which would amount to "treatment as a child of the family". Whilst noting that every claim turns on its own facts, he explained what behaviour would be insufficient for such purposes, at p. 235D-E as follows:-

"*One point is, in my opinion, clear beyond doubt and indeed, I think, has been common ground on this appeal: the legislature cannot have contemplated that the mere display of affection, kindness or hospitality by a step-parent towards a step-child will by itself involve the treatment by the step-parent of the step-child as a child of the family in relation to the marriage, for the purpose of section 1(1)(d), so as to place the parent and his or her estate under a potential liability to provide for the step-child. Something more is needed: reasonable step-parents can usually be expected to behave in a civilised and friendly manner towards their step-children, if only for the sake of their spouse*."

He then considered the question what more was needed, and cited with approval the passage from the judgment of Booth J in *Callaghan* referred to above. Picking up on the theme of the privileges and duties of two persons who stand in the relationship of parent and child, he said this, at p. 237C-D:-

"*I can see no reason why even an adult person may not be capable of qualifying under that subsection provided that the deceased has, as wife or husband (or widow or widower) under the relevant marriage, expressly or impliedly, assumed the position of a parent towards the applicant, with the attendant* responsibilities and privileges *of that relationship. If things take their natural course, the privileges of the quasi-parent may well increase and the responsibilities may well diminish as the years go by*"

44. In this case, I am directed to decide the question of Julie's standing to bring a claim under section 1 (1) (d) as a preliminary issue. I must do so on the basis of the evidence which has been submitted by Julie in support of her claim. That evidence has not been tested in cross-examination, and so I must take it at face value. Mr Sherwin submits that, even doing so, the evidence is insufficient to establish a quasi-parent-child relationship, as between Julie and either Rosemary or Malcolm, of the character required to establish standing under section 1 (1) (d).

45. What is that evidence? In the joint statement served by Neil and Julie dated 12 February 2023, the following matters are relied upon:-

    a) Julie had been estranged from her own biological mother for over 20 years;

    b) Julie and Neil together had been to holidays by Rosemary and Malcolm including a Millenium cruise;

    c) Julie and Neil had together been given £30,000 as a deposit towards a house;

    d) Julie had played an instrumental role in Rosemary's care towards the end of her life in taking her shopping, undertaking errands and in her admission to a hospice;

    e) Julie and Neil had together helped Malcolm following his dementia diagnosis, taking him on outings and hospital appointments and helping with shopping and dealings with his bank; they would have done more but were usurped by the defendants;

    f) Julie and Neil together were helped financially by Rosemary when the cost of living became tight, and both Rosemary and Malcolm were generous with birthday and Christmas gifts;

    g) Julie and Neil were often invited to spend time with Rosemary and Malcolm;

    h) Julie was included in Rosemary's and Malcolm's wills as a discretionary beneficiary, and her son Aaron was bequeathed a legacy of £3000 in Malcolm's will, described there as a step-grandchild.

    In her submissions to me, Julie provided some further colour to the description of her own relationship with Rosemary before her death, which I have also taken into account.

46. The crucial question, in my judgment, is whether the relationship between Julie, and Rosemary and / or Malcolm, as evidenced in such conduct and behaviour, was one of parent(s) and daughter as opposed simply to that of parent(s) and a daughter-in-law. Was any such behaviour anything more than one would expect between parents and the wife of their son. Was the financial help and generosity which they bestowed upon Neil and Julie anything more than a desire to assist their son, and through him, Julie as his wife and partner? And did Julie perform any role or undertake any responsibility to Rosemary or Malcolm which went outside or beyond that which one might ordinarily expect from their own child's spouse or partner?

47. Mr Sherwin argues, persuasively, that there is nothing in Julie's account of her relationship with Rosemary and Malcolm to take it outside the usual relationship between parents and daughter-in-law. I agree with his analysis. There is no reason to doubt that Julie's relationship with her parents-in-law over the years was one of mutual support and reciprocated kindness and hospitality, but this does not signal that Julie was taken under the wing of Rosemary and Malcolm as a daughter in her own right, or that Julie herself assumed any responsibility to them as a child to one's parents, rather than just as Neil's own wife and partner.

48. This analysis finds further objective support in the terms of Rosemary's and Malcolm's wills and the letter of wishes. It is notable that no provision is made to Julie in either their wills or the letter other than as Neil's spouse or partner, both during his lifetime and after his death. That was in no way to diminish their regard or concern for Julie, but just to indicate that it was one which they held for her as Neil's spouse, rather than as a child of the family in her own right. Likewise, whilst Malcolm left a legacy to Aaron as his step-grandchild, Aaron did not benefit from the same provision as that made by Rosemary and Malcolm for their own grandchildren, as might have been the case if their relationship with Julie was one where she was treated as a child of the family.

49. In my judgment, there was nothing in Rosemary and Malcolm's relationship with Julie which went beyond the usual "*display of affection, kindness and hospitality*" between parents and daughter-in-law, to adapt Slade LJ's dictum in *Leach*. Accordingly, I am not satisfied that Julie has standing to bring a claim under the 1975 Act under section 1 (1) (d) in either its original or amended terms.

The third issue: should permission be granted under section 4 to bring the claims out of time?

50. In the light of my determination of the first two issues, the question whether I should grant permission under section 4 for the claims in respect of Rosemary's estate or Malcolm's estate to be brought out of time does not any longer require deciding. However, in case I am wrong on my conclusions on either of the first two issues, I shall state my conclusions of this third issue.

51. The claims in respect of Rosemary's estate are brought some 7 ½ years out of time; in respect of Malcolm's estate they are brought 10 months out of time.

52. I have a discretionary power under section 4 to permit such claims to be brought outside the six month period following grant of probate provided for under the section. In exercising that power, I should have regard to the various factors set out in *Berger v Berger* [2014] WTLR 35 at [44], themselves distilled from earlier decisions of the court in *Re Salmon* [1981] Ch 167 and *Re Dennis* [1981] 2 All ER 140, as follows:-

> "*(1) The court's discretion is unfettered but must be exercised judicially in accordance with what is right and proper.*
>
> *(2) The onus is on the applicant to show sufficient grounds for the granting of permission to apply out of time.*

(3) The court must consider whether the applicant has acted promptly and the circumstances in which she applied for an extension of time after the expiry of the time limit.

(4) Were negotiations begun within the time limit?

(5) Has the estate been distributed before the claim was notified to the defendants?

(6) Would dismissal of the claim leave the applicant without recourse to other remedies?

(7) Looking at the position as it is now, has the applicant an arguable case under the Inheritance Act if I allowed the application to proceed?"

53. The first and second factors are of crucial import. There must be a principled basis for exercising the power. In the words of Sir Robert Megarry V-C in *Re Salmon*, at p. 175:-

"*the onus lies on the plaintiff to establish sufficient grounds for taking the case out of the general rule, and depriving those who are protected by it of its benefits. Further, the time limit is a substantive provision laid down in the Act itself, and is not a mere procedural time limit imposed by rules of court which will be treated with the indulgence appropriate to procedural rules. The burden on the applicant is thus, I think, no triviality: the applicant must make out a substantial case for it being just and proper for the court to exercise its statutory discretion to extend the time*."

54. However, as explained by Asplin LJ in *Cowan v Foreman* [2020] Fam 129, the court should not adopt a disciplinary approach in exercising its discretion. As she notes in her judgment at [51]:-

"*It seems to me that although the applicant must put forward a substantial case, that it is not necessarily true that there must be a good reason for all delay in every case. Each case turns on its own facts and, in each case, the judge is required to weigh the Berger factors and to reach a decision. If, as in* McNulty v McNulty *[2002] WTLR 737 the applicant has a strong claim for reasonable financial provision, it may be appropriate, taking into account all of the other relevant factors, to exercise the section 4 power, despite the lack of a good reason for delay or some part of it ... It seems to me, therefore, that the judge in this case was wrong to require there to be a "good reason" for all periods of delay without considering the matter in the round*."

She then continued, on the theme of prospects of success, as follows at [52]:-

"*I agree with Mr Wilson and Ms Angus, however, that it is necessary to decide whether an applicant's claim has a real prospect of success rather than a fanciful one and if the claim has no real prospect of success, there is no point in considering the other relevant factors. That was made clear in* In re Dennis, decd *[1981] 2 All ER 140, 144J–145A, 146D–E, per Browne-Wilkinson J. The court will not entertain a claim with no merit which is commenced outside the six-month time limit, merely because the delays can be explained and no one is prejudiced. The corollary is not necessarily true. If the claim would pass the summary judgment test, it does not mean that the court will exercise the*

section 4 power to extend time. It is dependent upon an evaluation of all of the relevant factors in the circumstances.'

55. In their joint statement of 12 February 2023, Neil and Julie provided the following reasons as to why they had not brought their claims any earlier, which I set out verbatim:-

> *Claimants were present with Rosemary signing a Codicil to her Discretionary Will Trust, 2 weeks before she died, giving instructions that all monies from her Trust Fund be spend for the ongoing care of Malcolm, Claimants were totally respectful of Rosemary's wishes. Malcolm died in January 2021.*
>
> *Family Dynamics were 'profoundly awry' with alleged 'skulduggery' going on by Executor/Trustees being in contact with a number of family relatives not necessarily included as beneficiaries in the Will Trusts and a Neighbour (deceased) who originally had first refusal on family home 'Tideways' should it come 'up for Sale' (included on Land Registry information).*
>
> *Claimants 'felt bullied', for example Claimant (1) denied access to speak to his Father's GP and Consultant, Defendants took over all Health and Welfare issues, although we were requesting Accounts and questioning Actions taken by Executor/Trustee Alistair Stewart and Trustee Richard Jordan*
>
> *Claimants allege coercion by Defendants, we argue that Discretionary Trusts are 'flimsy, scant and vague' given them 'loopholes' for absolute legal control with Claimants arguing UK Legal System didn't protect them.*
>
> *Claimants argue that they were poorly advised by Solicitors they employed who never advised them about Inheritance Act 1975*

56. I shall consider the question whether permission should be granted separately as regards the claims in respect of Rosemary's estate, and Malcolm's estate.

The claims in respect of Rosemary's estate

57. Neil and Julie acknowledge in the first paragraph cited above that they wished to respect Rosemary's wishes as to the disposition of her estate under her will. They were content for Malcolm to receive the income during his life, and to await any distributions from her trust fund in their favour which the defendants might make after Malcolm's death. In the light of that decision, it would be very difficult for them to make out any substantial grounds for the court permitting them now to make a claim under the Act, in essence because they are now disappointed with the way in which the defendants are proposing to exercise their discretionary powers under the will trusts.

58. The claim that they felt "*bullied*" appears in reality to be a complaint about the fact that Malcolm's attorneys took over his care, and failed to account to Neil and Julie's satisfaction for the decisions they were taking or the fees which were being incurred. This has no obvious causal relationship with their failure to bring claims any earlier in respect of Rosemary's estate.

59. The claim that "*family dynamics were profoundly awry*" is a form of words lifted direct from the judgment of Chief Master Marsh in *Re Bhusate* [2019] EWHC 470 (Ch), [2019] WTLR 393, at [59(6)], a case on which Neil and Julie rely, in which the master granted permission to bring a claim some 25 years out of time. The facts of that case were exceptional, and bear no relation to the present. There is no explanation as to how family dynamics were awry or how this impacted in any way on Neil and Julie's ability to bring a claim. Nor, I hasten to add, is there any evidence to substantiate any allegation of skullduggery on the part of the defendants, and I pay no regard to it.

60. The length of time which has elapsed since the grant of probate in respect of Rosemary's estate is very substantial. As Chief Master Marsh observed in *Bhusate* at [43], the longer the delay the more compelling the grounds will have to be to justify the exercise of the discretion in a claimant's favour. Unlike in *Bhusate*, there is no credible explanation for the delay other than Neil and Julie's own choice to respect Rosemary's own wishes. And, moreover, unlike *Bhusate* or *McNulty* this is not a case where Neil or Julie have a claim of any compelling strength in respect of either estate, even putting to one side my determination on the first two preliminary issues above.

61. I have little hesitation in concluding that there is no proper basis for permitting a claim by either Neil or Julie to brought now against Rosemary's estate, and that I should accordingly dismiss the application for such permission.

The claim in respect of Malcolm's estate

62. The position as regards Malcolm's estate is undoubtedly more nuanced, not only because the delay is much shorter, but also because Neil and Julie claim that they were not advised of their ability to bring such a claim despite the fact that Neil had engaged Anthony Gold to act for him in relation to his interests in respect of both estates in September 2021, whilst he was still within time to make a claim.

63. The advice which Neil, or latterly Julie, may or may not have received from Anthony Gold in respect of any claim under the 1975 Act would be highly material in considering whether a substantial case was made that it was just and proper to allow a claim be made out of time. For that reason, in directing that the question of permission should be determined as preliminary issue, Chief Master Shuman noted that Neil and Julie should take advice on whether to waive privilege in, and to disclose, any legal advice which they had received in this respect, as recorded in the fourth recital to her order of 18 April 2023. In her statement dated 27 August 2023 Julie said that she would waive privilege, but she did not disclose any such advice with her statement and has not done so since in the period leading up to this hearing. Regrettably, therefore, I am unable to make any findings on what advice she and Neil may or may not have received, and cannot take any possible failure which there may have been to give appropriate advice into account as a reason in favour of granting permission.

64. If there has been any such failure, conversely, that might well provide grounds on which a claim could be brought on behalf of Neil's estate, or by Julie on her own behalf, against their professional advisers. They would not therefore be left without a remedy where any negligent failure to give appropriate advice has resulted in the loss of a claim under the 1975 Act in respect of Malcolm's estate which might otherwise have been successful.

65. Be that as it may, I am left with the clear impression from the correspondence with took place in the period following Malcolm's death and culminating in Mr Jordan's letter of 15 July 2022, and from the stated grounds of the claim itself, that Neil and Julie chose to bring a claim under the 1975 Act only after they learnt that the defendants were not prepared to accede to Neil's request that his family's share of the trusts should be passed to him for him to administer, and as a reaction to that disappointment. I agree with Mr Sherwin that a claimant who seeks to ride two horses in this way cannot expect the sympathy of the court. The 1975 Act is not a bargaining tool, nor something for a beneficiary to fall back on if he or she is disappointed with trustees' decision as to how they should exercise the discretionary powers conferred upon them. Section 4 requires a claimant to stake their entitlement to relief under the 1975 Act within the six months allowed, rather than to wait and see whether it is necessary to resort to the Act.

66. There are other *Berger* factors which weigh in the balance on either side of the scales:-

a) there were no negotiations in respect of a potential claim under the 1975 Act commenced within the time limit; indeed, as I have noted above, there was no intimation whatsoever of a potential claim until proceedings were issued and served in October 2022;

b) however, there has been no distribution of Malcolm's estate in the intervening period; in fact it appears that the defendants were on the point of making distributions when the claim was served upon them, in consequence of which such distributions were suspended; that is inconvenient for the intended beneficiaries, including Neil and Julie's children, but the absence of any actual distribution it is a factor which weighs in the balance in Neil and Julie's favour;

c) putting aside the first two issues on which I have determined that neither Neil's nor Julie's claims can be pursued, I consider that the claims might otherwise be arguable, but they are by no means compelling; I would not regard this as a reason weighing in the balance in Neil and Julie's favour.

67. Taking all these matters into account, I would not grant permission for Neil or Julie to bring a claim in respect of Malcolm's estate 10 months out of time. That decision is not an easy one, but is informed to a large degree by the considerations set out in paragraph 65, together with the absence of evidence substantiating Neil and Julie's assertion that their failure to bring a claim in respect of Malcolm's estate in time was due to poor advice from their solicitors.

Conclusion

68. As a result of my determinations on the first and second issues, Neil's claims in respect of Rosemary's and Malcolm's estate stand to be dismissed, and Julie's claims stand to be struck out. In any event, the claims would otherwise have fallen to be dismissed as a result of my determination on the third issue that permission should not be granted for them be brought out of time.

69. I will consider what costs and other orders should follow from this at the consequentials hearing which is listed to take place immediately following the handing down of this judgment.