Legal Studies (2025), 1–6
doi:10.1017/lst.2025.10070

S·L·S
The Society of Legal Scholars

CURRENT DEVELOPMENTS: CASE COMMENT

Till death do these (financial relief) proceedings part: *Unger and Another (in substitution for Hasan) (Appellants) v Ul-Hasan (Deceased) and Another (Respondents)* [2023] UKSC 22

Leon Vincent Chan[†]

University College London, London, United Kingdom
Email: leon.chan.21@ucl.ac.uk

(Received 06 January 2024; revised 02 April 2025; Accepted 07 April 2025)

Introduction

Financial relief proceedings come after divorce proceedings, whether in the same jurisdiction or not. In most cases, whether proceedings can continue against the other party is not an issue; the difficulty usually lies in the determination of the outcome of the financial relief proceedings. However, what happens when one party to the proceedings passes away before proceedings conclude? This was the crux of *Unger and Another (in substitution for Hasan) v Ul-Hasan (Deceased) and Another* [2023] UKSC 22 (*Unger*).

In *Unger*, the Supreme Court dealt with two issues: first, what the 'true construction' is of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984) read with the Matrimonial Causes Act 1973 (MCA 1973) (collectively, the wife's 'Financial Relief Application'), and whether this power can only be exercised between parties to a marriage who are both alive; and secondly, whether a claim for financial relief under the MFPA 1984 is a type of cause of action which survives against the estate of a deceased party to the marriage under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (LR(MP)A 1934). This second issue is contingent on the first.

This significant decision explored the implications arising from the different bases on which division of matrimonial property (division) is premised as compared to maintenance. The former could give rise to a cause of action that survives the death of a party to the marriage while the latter cannot. This affects whether such proceedings can continue against the deceased spouse's estate. Reform, as a result, cannot be a mere plaster; it requires an overhaul of the orthodox understanding of financial relief applications as a right or entitlement, and not merely a discretion by the Courts. Although the Supreme Court agreed with the High Court that the financial relief application could survive the death of one party to the marriage, the Supreme Court held that they were not '*competent*' to change the policy under the MFPA 1984 and MCA 1973; only Parliament is. For different reasons, the Supreme Court unanimously rejected the appeal as well. It is therefore necessary to analyse both the High Court and Supreme Court decisions in *Unger* to understand their differences.

[†]PhD Candidate and Graduate Lecturer, University College London; Research Associate, Centre for Asian Legal Studies, Faculty of Law, National University of Singapore. The author is grateful to Professor Rob George KC, Professor Leong Wai Kum, Cason Yong, Deseree Oon, Charlotte Choo, Jay Ong, Noel Low, and the anonymous reviewer(s) for their comments on earlier drafts of this case comment. Any errors, however, remain the author's own.

1. Facts and outcomes

The parties were married in 1981 and obtained a divorce in Pakistan in 2012 (an overseas divorce vis-à-vis England and Wales). The Court recognised that the foreign divorce was valid and leave was granted to the wife in 2017 to apply for financial relief under Part III of the MFPA 1984. Section 17(1) of the MFPA 1984 imports all the Courts' powers under sections 23(1) and 24(1) of the MCA 1973.

The husband died before the wife's financial relief application could be heard substantively by the High Court, after multiple delays in proceedings. Thereafter, the wife sought to continue her financial relief application against the husband's estate. This application was dismissed by the High Court.

She then applied for leave to appeal to the Supreme Court. After leave to appeal was granted to the wife by the Supreme Court in April 2022, but before the matter was heard in October 2022, the wife died in May 2022.[1] Nonetheless, the wife's estate continued with the appeal for the continuation of her financial relief application against the husband's estate. Leave was granted to parties to appeal directly to the Supreme Court since the Court of Appeal would be bound by its earlier decision in *Sugden*.[2]

(a) Decision of the High Court

Mostyn J held that he was bound[3] by the Court of Appeal decision of *Sugden v Sugden*[4] in considering the LR(MP)A 1934. In *Sugden*, the Court considered whether an order for maintenance against the husband survived after his death and was enforceable against his estate. Denning LJ held that the husband's estate was not liable for the continuation of maintenance because no enforceable right accrued at the time of the husband's death:[5]

> … the right or liability must have accrued due at the time of his death … there is more difficulty in the Divorce Court. In that Court there is no right to maintenance, or to costs, or to a secured provision or the like, until the court makes an order directing it. There is therefore no cause of action for such matters until an order is made.

Although Denning LJ also held that the fact that a cause of action is discretionary does not necessarily or automatically mean that the cause of action is not covered by section 1(1) of the LR(MP)A 1934, he found that the child maintenance was not a cause of action that survived the husband's death.[6]

Despite dismissing the wife's application because of *stare decisis*, Mostyn J explained how he respectfully (and strongly) disagreed with Denning LJ's decision in *Sugden*:[7] first, a textual interpretation of section 1(1) of the LR(MP)A 1934 would recognise post-divorce ancillary relief as a cause of action that is not excluded from the section; secondly, post-divorce ancillary relief is a valuable claim that is not speculative; and finally, post-death relief has been awarded to set aside a financial remedy order where the payee dies shortly after the order has been made under section 25 of the MCA 1973.

Focusing on the first reason, Mostyn J applied a textual analysis of section 1(1) of the LR(MP)A 1934 and argued that there were other actions – including criminal conversation and damages for knowingly seducing a wife away from cohabitation with her husband – that were 'also personal, discretionary, and obviously required living actors' which were considered 'causes of action' that survived death under section 1(1) of the LR(MP)A 1934.[8] It would be 'inconceivable that Parliament is to be taken as not

[1] *Unger and Another (in substitution for Hasan) v Ul-Hasan (Deceased) and Another* [2023] UKSC 22, [18]–[20].

[2] *Nafisa Hasan v Ul-Hasan (Deceased) & Another* [2021] EWHC 1791 (Fam), [70].

[3] There are doubts as to whether the observations by the Court of Appeal in *Sugden v Sugden* [1957] P 120 were *obiter dicta*. However, the High Court in *Hasan* disagreed. See *Harb v King Fahd Bin Abdul Aziz* [2006] 1 FLR 825, [52]; *Hasan*, [22].

[4] [1957] P 120.

[5] *Sugden*, 134–135.

[6] *Sugden*, 134–135.

[7] *Hasan*, [24].

[8] *Hasan*, [39].

https://doi.org/10.1017/lst.2025.10070 Published online by Cambridge University Press

having so designated a claim' for post-divorce financial relief to be similarly considered as a 'cause of action' since it was also personal and discretionary.[9] If this was an accepted premise, it 'can be seen that Parliament specifically decided not to include a claim for post-divorce relief in the list of excluded causes of action' under the LR(MP)A 1934.[10]

(b) Decision of the Supreme Court

The Supreme Court disagreed[11] with the High Court's characterisation of the matter as being 'whether the unadjudicated claim by the wife under Part III [of the MFPA 1984] survives the death of the husband and can be continued against his estate' to begin with.[12] Instead, the Supreme Court agreed with the House of Lords' approach in *Barder v Barder*:[13] the real question is whether further proceedings in the divorce suit can be taken after one party to the suit has died. This depended on three issues: first, identifying the nature of the further proceedings sought; secondly, determining the true construction of the relevant statutory provision(s); and thirdly, considering the applicability of section 1(1) of the LR(MP)A 1934, if necessary.[14]

Lord Stephens' (with whom Lord Hodge, Lord Hamblen, and Lord Burrows concurred) lead judgment found that Mostyn J's 'magisterial and potentially seminal judgment' had prematurely skipped to the third consideration found in *Barder* – the applicability of section 1(1) of the LR(MP)A 1934.[15] However, Lord Stephens acknowledged that the third consideration would have been 'relatively straightforward' if the rights are those which can be continued after one party to the divorce proceedings has died.[16] Applying the ratio in *Barder*, Lord Stephens held that the issue is:[17]

> … whether, where one of the parties to an application under Part III of the [MFPA] 1984 … for financial relief has died, further proceedings can or cannot be taken.

There was no dispute that the nature of the further proceedings sought was the continuation of the financial relief application against the husband's estate.

In determining the true construction of the statutory provisions found in the MFPA 1984 and MCA 1973, following *Thomson v Thomson*,[18] *Dipple v Dipple*,[19] *Hinde v Hinde*,[20] *Sugden*, and *D'Este v D'Este*,[21] Lord Stephens affirmed the long-standing understanding from case law[22] that rights and obligations against the other spouse of the marriage are only personal in nature and that they do not survive the death of either spouse (the orthodox understanding). These rights and obligations must only be adjudicated between *living* parties. Parliament is presumed to have knowledge of such an established understanding[23] because, from a holistic perspective, Parliament chose to follow this orthodox understanding when enacting the Inheritance (Provision for Family and Dependants) Act 1975 (I(PFD)A 1975),[24] despite the

[9] *Hasan*, [38].
[10] *Hasan*, [40].
[11] *Unger*, [22]–[28].
[12] *Hasan*, [3].
[13] *Barder v Barder* [1988] AC 20, 36–37.
[14] *Barder*, 37.
[15] *Unger*, [4] and [34]–[35].
[16] *Unger*, [35].
[17] *Unger*, [30].
[18] [1896] P 263.
[19] [1942] P 65.
[20] [1953] 1 WLR 175.
[21] [1973] Fam 55.
[22] *Unger*, [41]–[64].
[23] *Unger*, [39].
[24] *Unger*, [66]–[72].

https://doi.org/10.1017/lst.2025.10070 Published online by Cambridge University Press

issue from the financial relief application being raised by the Law Commission in 1974.[25] That the MFPA 1984 and MCA 1973 (including their amendments)[26] did not specifically provide for such an exception is evidence that Parliament did not intend for applications for financial relief under the two statutes to survive the death of one spouse during proceedings. Considered altogether, Lord Stephens concluded that a textual analysis[27] showed that the Courts lacked jurisdiction to make an order for financial relief under the MFPA 1984 and MCA 1973 on the death of one spouse. However, it was acknowledged that although the decision of *Barder* created a limited exception to the rule that the MCA 1973 created personal rights and obligations that do not survive the death of a party to the marriage, this was 'not a sufficient basis on which to undertake a radical change to the construction of matrimonial legislation'.[28]

This conclusion meant that the third issue from section 1(1) of the LR(MP)A 1934 did not arise for determination.[29] However, Lord Stephens acknowledged that while there may be strong arguments for reform, it was for Parliament to do so.[30]

Concurring with Lord Stephens, Lord Leggatt (with whom Lord Hodge, Lord Hamblen, and Lord Burrows agreed), addressed the issues raised in relation to Mostyn J's observations on the defects in the law in relation to section 1(1) of the LR(MP)A 1934. Lord Leggatt agreed with Lord Stephens[31] that claims for financial relief under the matrimonial legislations are no longer a 'mere hope or contingency'; it is now a right and a cause of action under the MFPA 1984 and MCA 1973 that is 'capable of passing on death by operation of the [LR(MP)A 1934]'.[32] This dismissed Denning LJ's *dictum* in *Sugden* that financial relief applications did not give rise to a cause of action unless they 'really are rights and not mere hopes or contingencies'.[33]

Despite concluding that modern financial relief applications are causes of action that survive the death of one party to the marriage, like Lord Stephens, Lord Leggatt acknowledged that the injustice of the situation results from the textual analysis of the claims under the MFPA 1984 and MCA 1973 as being personal in nature, which do not survive the death of one party to the marriage;[34] both parties must be alive at the time of the adjudication, and the orthodox understanding prevails.

2. Comment

In addition to the comparisons between the two Courts' decisions above, this comment focuses on two issues: first, the evolution in the substantive understanding of financial relief applications; and secondly, the need for extensive reform in this area of the law.

Unger exposed a lacuna within the law with respect to the evolution in the understanding of financial relief applications: on one hand, the financial relief application is now a right that parties to a marriage have because they are 'entitled to a fair share of the available [matrimonial] property' for division on divorce,[35] since current financial relief goes beyond maintenance and is no longer solely based on the parties' needs:[36]

> … 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*

[25] Law Commission, *Second Report on Family Property: Family Provision on Death* (Law Com No 61, 1974), [60]–[63].
[26] *Unger*, [73]–[75].
[27] *Unger*, [78]–[94].
[28] *Unger*, [95]–[100].
[29] *Unger*, [103].
[30] *Unger*, [101].
[31] *Unger*, [8].
[32] *Unger*, [115]–[116].
[33] *Sugden*, 134.
[34] *Unger*, [117]–[141].
[35] *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618, [9]; and *Unger*, [8] and [115]–[123].
[36] *Unger*, [122].

https://doi.org/10.1017/lst.2025.10070 Published online by Cambridge University Press

> *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. (Emphasis added)

On the other hand, a textual analysis and true construction of the two statutes by the Supreme Court showed that Parliament had intended for the orthodox understanding to prevail within them. These two positions are therefore in conflict with one another because although, substantively, the Supreme Court agreed with the High Court that the financial relief application (at least insofar as division is concerned) is a cause of action that is capable of surviving the death of one party, the Supreme Court found that this was constrained by Parliament's adoption of the orthodox understanding within the MFPA 1984 and MCA 1973. Even though the Supreme Court acknowledged injustice in this case, they were reluctant to resolve this tension by redefining the orthodox understanding; instead, they found that judicial interpretation is limited in the circumstance. This approach can be contrasted with the House of Lords' approach in *Miller v Miller*, where they were more ready to find that there is an evolution of the modern understanding of financial relief as an entitlement that arises from the equal sharing principle, despite this not being provided for by Parliament within the MCA 1973 itself. Fairness was recognised to be an 'elusive concept' within financial relief, which resulted in the Courts needing to 'perform [its] necessary function' while not 'usurp[ing] the legislative function'.[37] More judicial intervention could therefore have been warranted in *Miller* since there was limited guidance by Parliament.

This demonstrates that substantive issues arising from the orthodox understanding must be dealt with directly by Parliament: the modern understanding of financial relief as a right or entitlement – and therefore not simply personal in nature – must replace the orthodox understanding. As noted above, this is because modern financial relief is unlike the past, when the bases for division were different; they were discretionarily based on needs and not considered an entitlement. With the modern bases of division including equal sharing and compensation for financial loss on top of needs, such a financial relief application has now become 'a cause of action capable of surviving the death of either party'.[38]

Further, 'radical' reform will need to come from Parliament to address the root of the issue – the orthodox understanding that ancillary relief applications are personal in nature and therefore incapable of surviving the death of one party to the marriage – since it does 'impact on the law of succession and potentially also on the law of insolvency'.[39] This requires Parliament to first expressly abolish the orthodox understanding that forms the basis of the MFPA 1984 and MCA 1973, and legislate that the modern characterisation of financial relief is valid. Financial relief will then be a party's entitlement as of right and not merely personal; in turn, it can be a cause of action that is capable of surviving the death of one party under the LR(MP)A 1934.[40] Further, since the I(PFD)A 1975 provided the holistic background – that there is a more limited remedy found there for parties who died domiciled in England and Wales – to show that the orthodox understanding was adopted by Parliament, Parliament will also need to decide how this statute interacts with the MFPA 1984 and MCA 1973, including whether to impose any limitations or to reform the entire interaction altogether.[41] On the facts, there is no real 'duplication' of two different routes to financial relief simply from the amendments to the I(PFD)A 1975 in 1984, since a deceased party not domiciled in England and Wales (as in this case) will not have had a choice. Even if there were two different routes for financial relief claims, a double claim can be easily prevented and rejected by the Courts as an abuse of process.

[37] *Miller*, [4]–[8].
[38] *Unger*, [123].
[39] *Unger*, [101] and [141].
[40] See *Unger*, [8], [40], [103], and [116].
[41] *Unger*, [135]–[141].

https://doi.org/10.1017/lst.2025.10070 Published online by Cambridge University Press

Conclusion

Sympathy for the matter is not enough to resolve this issue. Following *Unger*, reform to this area cannot be merely piecemeal. The Courts have recognised that there is a right that arises from financial relief with respect to equitable division. This right is a cause of action that survives the death of one party to the marriage during proceedings. As the Supreme Court reasoned, this is because the current bases of division – which includes the sharing principle – makes it wrong to describe the modern financial relief application as a 'mere hope'. This decision has therefore redefined – or, at the very least, recognised the nuances arising from – the differences between maintenance and division. However, as rightly concluded by the Supreme Court, it is not in a position to change the orthodox understanding within the MFPA 1984 and MCA 1973. It is now up to Parliament to decide whether to act.

Cite this article: LV Chan 'Till death do these (financial relief) proceedings part: *Unger and Another (in substitution for Hasan) (Appellants) v Ul-Hasan (Deceased) and Another (Respondents)* [2023] UKSC 22.' (2025) *Legal Studies* 1–6. https://doi.org/10.1017/lst.2025.10070