

FINANCIAL RELIEF AFTER FOREIGN DIVORCES AND THE LIMITS OF JUDICIAL
INTERPRETATION

AN England and Wales court has the power to grant financial relief after a foreign divorce under Part III of the Matrimonial and Family Proceedings Act 1984 (*Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 A.C. 628). In *Unger v Ul-Hasan* [2023] UKSC 22, the Supreme Court had the opportunity to consider the interesting question of whether the court's power to grant financial relief after a foreign divorce is only exercisable as between *living parties* to a former marriage. Put another way, does an unadjudicated application for financial relief by a party to a former marriage expire with the other party's death and therefore cannot be continued against the other party's estate? The Supreme Court unanimously answered this in the affirmative, with the lead judgment delivered by Lord Stephens (with whom Lord Hodge, Lord Hamblen and Lord Burrows agreed) and the concurring judgment delivered by Lord Leggatt (with whom Lord Hodge, Lord Hamblen and Lord Burrows agreed).

The facts of *Unger v Ul-Hasan* were as follows. The wife and the husband, who married in Pakistan in 1981, separated in 2006 and divorced in Pakistan in 2012. In 2017, the wife applied for financial relief in England and Wales under Part III of the Matrimonial and Family Proceedings Act 1984. Unfortunately, in 2021, the husband, who was domiciled in Pakistan, died in Dubai before the wife's application for financial relief could be adjudicated by the court. Consequently, the wife sought to continue her application for financial relief against the husband's estate (at [16]).

In the High Court, Mostyn J. (whose judgment was described by Lord Stephens as “magisterial and potentially seminal” (at [4])) dismissed the wife's application for financial relief on the ground that it expired with the husband's death (at [5]). In so ruling, Mostyn J. took the view that he was bound by the Court of Appeal decision in *Sugden v Sugden* [1957] P 120 notwithstanding that he disagreed with it. It will be recalled that it was held in *Sugden v Sugden* that the husband's estate was not liable for future child maintenance as the children's right to seek maintenance from the court expired with the husband's death (*Sugden v Sugden* [1957] P 120, 134–35). Given that the Court of Appeal would also be bound by *Sugden v Sugden*, Mostyn J. granted a certificate to the wife under the Administration of Justice Act 1969 which enabled her to make an application to the Supreme Court for leave to appeal directly from the High Court to the Supreme Court. In 2022, the Supreme Court granted leave to the wife.

In Lord Stephens' lead judgment, he explained that the question of whether further proceedings could be taken where a party to an

application for financial relief after a foreign divorce has died could be answered by determining whether “on their true construction, the statutory provisions in the [Matrimonial and Family Proceedings Act 1984 and the Matrimonial Causes Act 1973] create personal rights and obligations which can only be adjudicated between living parties” (at [32]–[33]). In the process of statutory interpretation, Lord Stephens reminded himself that both the internal context and the external context are relevant (at [36]–[37]). In his view, therefore, the court should consider, *inter alia*, the legal context consisting of relevant case law at the time at which the Matrimonial and Family Proceedings Act 1984 and the Matrimonial Causes Act 1973 were passed in order “to arrive at the true construction of the relevant statutory provisions” (at [38]). Following a detailed examination of the relevant case law (*viz.* *Thomson v Thomson* [1896] P. 263; *Dipple v Dipple* [1942] P. 65; *Hinde v Hinde* [1953] 1 W.L.R. 175; *Sugden v Sugden* [1957] P. 120; *D’Este v D’Este* [1973] Fam. 55) (at [42]–[56]), Lord Stephens concluded that there is “a long-established legal understanding that rights against one’s spouse are personal only and do not survive the death of either spouse” (at [57]). Lord Stephens then proceeded to analyse the Inheritance (Provision for Family and Dependents) Act 1975 (at [66]–[77]) and found it to be consistent with “[t]he orthodox understanding that financial provision on divorce only enables orders to be made as between living parties to a former marriage” (at [65]). Finally, Lord Stephens demonstrated that a textual analysis of the relevant statutory provisions in the Matrimonial and Family Proceedings Act 1984 and the Matrimonial Causes Act 1973 (at [79]–[93]) supported the position that the court does not have the power to grant financial relief after a foreign divorce on the death of a party to a former marriage (at [94]).

In light of the above, Lord Stephens held that the court’s power to grant financial relief after a foreign divorce is only exercisable as between living parties to a former marriage and dismissed the wife’s appeal (at [102]). As Lord Stephens observed, the wife’s submission that an application for financial relief after a foreign divorce could be continued by a party to a former marriage despite the other party’s death “would . . . be a major reform involving radical change to long-established principles” (at [101]). While Lord Stephens acknowledged the possibility of reform, he cautioned that “reform is plainly for Parliament” and that “[i]t is not for the courts to distort the meaning of the words of the relevant statutes to achieve such a radical reform” (at [101]).

In Lord Leggatt’s concurring judgment, he expressed agreement with Lord Stephens in dismissing the wife’s appeal and “add[ed] some observations about the defect in the law which [Mostyn J.’s] important judgment has exposed” (at [104]). In particular, while Lord Leggatt took the view that a proper interpretation of Part III of the Matrimonial and

Family Proceedings Act 1984 meant that the court's power to grant financial relief after a foreign divorce is only exercisable as between living parties to a former marriage (at [124]), the injustice to the wife was clearly not lost on him (at [107]–[110]). Adding fuel to the fire was the fact that the wife could not apply to the court under the Inheritance (Provision for Family and Dependents) Act 1975 as the husband did not die domiciled in England and Wales, which meant that the wife could only rely on her unadjudicated application for financial relief under Part III of the Matrimonial and Family Proceedings Act 1984 (at [16]).

That said, Lord Leggatt made clear that “reform aimed at remedying the injustice that results from the limited ability to make a financial order after either party to the marriage has died” would be within the province of Parliament (at [141]). As Lord Leggatt put it, “[i]t is not open to [the Supreme Court] to cut the Gordian knot and achieve a solution by interpretation of the existing statutory provisions” (at [141]). This is undoubtedly correct as policy questions would be involved in such reforms (at [101]) and “[j]udges have no relevant expertise or easy access to the sort of material that informs legislative policy making” (Stelios Tofaris, “Limping into the Future: Negligence Liability for Mental Injury to Secondary Victims” [2022] C.L.J. 452, 456). In this regard, the Supreme Court's decision in *Unger v Ul-Hasan* should be commended for maintaining fidelity to the statutory language and for “avoid[ing] the reproach that hard cases make bad law” (*Fairchild v Glenhaven Funeral Services Ltd.* [2002] UKHL 22, [2002] 1 A.C. 32, at [36]).

All in all, one could say that *Unger v Ul-Hasan* ended on a somewhat bittersweet note. Granted, the wife was ultimately unsuccessful in her application for financial relief following the husband's death. However, both Lord Stephens' lead judgment and Lord Leggatt's concurring judgment have convincingly exposed the unsatisfactory state of the law in this area, which paves the way for Parliament to amend the law in order to avoid potential injustice to future parties who are caught in the wife's position. Coupled with the fact that family law principles relating to matrimonial property have evolved over the years (at [8]), it is indeed hoped that Parliament will heed the call for reforms soon. But for now, the law remains that the court's power to grant financial relief after a foreign divorce is only exercisable as between *living parties* to a former marriage.

MING REN TAN

Address for Correspondence: Faculty of Law, National University of Singapore, 469G Bukit Timah Road, Singapore 259776. Email: mingren@nus.edu.sg