

***The latest judicial thinking on the
anti-avoidance provisions of the 1975
Act***

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Section 10

“(1) Where an application is made to the court for an order under section 2 of this Act, the applicant may, in the proceedings on that application, apply to the court for an order under subsection (2) below.”

Compare s.9:

“(1) Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if an application is made for an order under section 2 of this Act, the court for the purpose of facilitating the making of financial provision for the applicant under this Act may order that the deceased’s severable share of that property shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Act as part of the net estate of the deceased. “



Section 10

“(2) Where on an application under subsection (1) above the court is satisfied—

(a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition, and

(b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as “the donee”) or by any other person, and

(c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

then, subject to the provisions of this section and of sections 12 and 13 of this Act, the court may order the donee (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order.”

Intention to defeat an application

Section 12(1)

- “that condition shall be fulfilled if the court is of the opinion that, on a balance of probabilities, the intention of the deceased (though not necessarily his sole intention) in making the disposition or contract was to prevent an order for financial provision being made under this Act or to reduce the amount of the provision which might otherwise be granted”

Dellal v Dellal [2015] EWHC 907 (Ch):

- “The motive does not have to be the dominant motive in the transaction; if it is a subsidiary (but material) motive then that will suffice.”

Intention to defeat claims against estate in general will suffice - no need for specific knowledge of 1975 Act: *Re Kennedy*

A discretion ...

s.12(3): “Where the court makes an order under section 10 or 11 of this Act it may give such consequential directions as it thinks fit (including directions requiring the making of any payment or the transfer of any property) for giving effect to the order or for securing a fair adjustment of the rights of the persons affected thereby.”

Adjustment of other gifts etc.

s.10(5): “Where an application (in this subsection referred to as “the original application”) is made for an order under subsection (2) above in relation to any disposition, then, if on an application under this subsection by the donee or by any applicant for an order under section 2 of this Act the court is satisfied—

(a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition other than the disposition which is the subject of the original application, and (b) that full valuable consideration for that other disposition was not given by the person to whom or for the benefit of whom that other disposition was made or by any other person, the court may exercise in relation to the person to whom or for the benefit of whom that other disposition was made the powers which the court would have had under subsection (2) above if the original application had been made in respect of that other disposition and the court had been satisfied as to the matters set out in paragraphs (a), (b) and (c) of that subsection; and where any application is made under this subsection, any reference in this section (except in subsection (2)(b)) to the donee shall include a reference to the person to whom or for the benefit of whom that other disposition was made.”



Section 10

“(2) Where on an application under subsection (1) above the court is satisfied—

(a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition, and

(b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as “the donee”) or by any other person, and

(c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

then, subject to the provisions of this section and of sections 12 and 13 of this Act, the court may order the donee (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order.”

Section 10

“(3) Where an order is made under subsection (2) above as respects any disposition made by the deceased which consisted of the payment of money to or for the benefit of the donee, the amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the amount of the payment made by the deceased after deducting therefrom any capital transfer tax borne by the donee in respect of that payment.

(4) Where an order is made under subsection (2) above as respects any disposition made by the deceased which consisted of the transfer of property (other than a sum of money) to or for the benefit of the donee, the amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the value at the date of the death of the deceased of the property disposed of by him to or for the benefit of the donee (or if that property has been disposed of by the person to whom it was transferred by the deceased, the value at the date of that disposal thereof) after deducting therefrom any capital transfer tax borne by the donee in respect of the transfer of that property by the deceased.”

Section 10

“(6) In determining whether and in what manner to exercise its powers under this section, the court shall have regard to the circumstances in which any disposition was made and any valuable consideration which was given therefor, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.”

Section 13 – trustees

“(1) ... the powers of the court ... shall be subject to the following limitation ... that the amount of any sum of money ... ordered to be provided ... shall not exceed the aggregate of so much of that money as is at the date of the order in the hands of the trustee and the value at that date of any property which represents that money or is derived therefrom and is at that date in the hands of the trustee

(2) ... the trustee shall not be liable for having distributed any money or other property on the ground that he ought to have taken into account the possibility that such an application would be made.”

A loophole?

- Section 10(2)
- Section 423 IA1986
- *B v IB* [2013] EWHC 3755 (Fam)

Section 11 – contracts

[Contracts are enforceable against estate specifically or in damages: *Schaefer v Schuhmann* [1972] AC 572 (PC)]

“(2) ... (a) that the deceased made a contract by which he agreed to leave by his will a sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate, and

(b) that the deceased made that contract with the intention of defeating an application for financial provision under this Act, and

(c) that when the contract was made full valuable consideration for that contract was not given or promised by the person with whom or for the benefit of whom the contract was made (in this section referred to as “the donee”) or by any other person, and

(d) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act.”

Section 11 – differences

- No time limit
- Section 12(2) presumption:

“Where an application is made under section 11 of this Act with respect to any contract made by the deceased and no valuable consideration was given or promised by any person for that contract then, notwithstanding anything in subsection (1) above, it shall be presumed, unless the contrary is shown, that the deceased made that contract with the intention of defeating an application for financial provision under this Act”

Sismey v Salandron

- [2022] WTLR 281 (HC Ch, Birmingham DR - HHJ Kelly)
- Deceased David
 - Wife Sheila, son Thomas.
 - New partner Marissa, new son.
 - = divorce
 - Approved agreed order to covenant to leave property to Thomas
 - Will revoked by marriage to Marissa.
 - Thomas sues on the covenant – valid under s.2 LP(MP)A 1989
 - Marissa seeks to set it aside under section 11

Sismey v Salandron

- Need to prove ‘bad motive’
 - No presumption
 - Variety of motives
 - But intention to protect the property from claims from Marissa etc against estate was among them
- Need to prove *not* full valuable consideration
 - *Hill v Haines* [2007] EWCA Civ 1284 – cannot look behind order of Family Court unless collusion
 - Collusion proven
 - But no sufficient evidence that Sheila had not given full consideration for the covenant to Thomas
 - NB burden of proof

Things to think about ...

- Remember sections 10 and 11
- Be careful with attendance notes – privilege/confidentiality
- Think about use of section 13 loophole for trusts
- Spend your money before you die

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