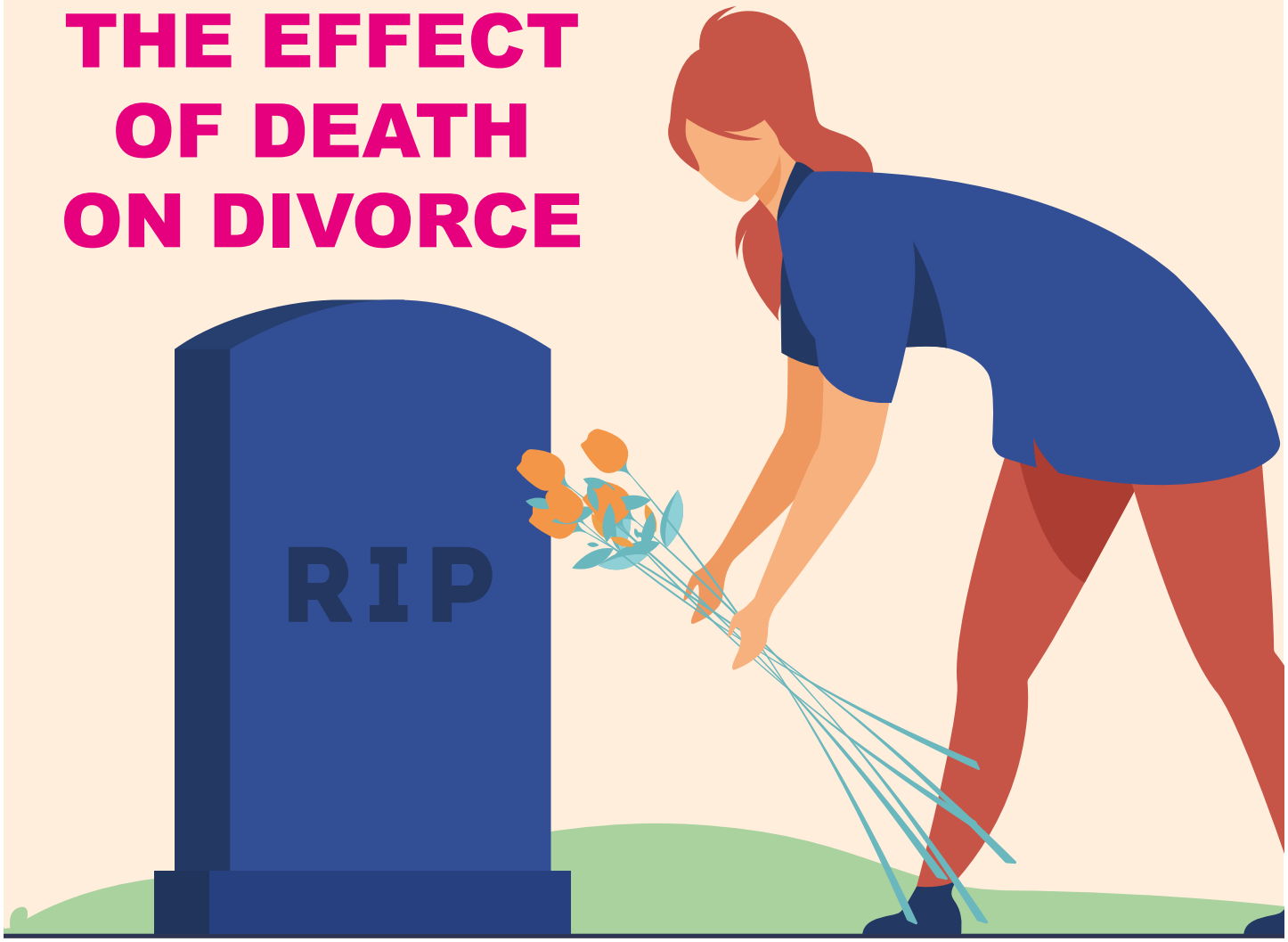
THE EFFECT OF DEATH ON DIVORCE



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Divorce is stressful and complicated enough. Aside from the emotional impact, dividing up hard won assets in a civilised manner is fraught with difficulty. Add in the effect of the death of one of the spouses and that adds a further layer of complication due to the impact (practical and legal) of probate, succession and inheritance tax.

In the event of a death before Decree Absolute, the matrimonial proceedings immediately come to an end. The logic is that there is no longer a marriage to dissolve and therefore the matrimonial proceedings simply fall away.

This has long been the case since Sugden v Sugden [1957] P120. In the case of Hasan v Ul Hasan (deceased) and Anor [2021] EWHC 1791 Mr Justice Mostyn expressed the view that a matrimonial claim was a cause of action that should survive death (as do most civil claims) bearing in mind that such claims were likely to be much less speculative than other civil claims. However he acknowledged that Sugden was binding on him and the matrimonial claim came to an end.

In England and Wales there is freedom of testamentary expression and the starting position is that the will of the deceased spouse (or the intestacy rules if there is no will) governs the devolution of their assets. This position can be varied by a claim pursuant to the Inheritance (Provision for Family and Dependents Act) 1975 ("IHA") which allows certain categories of people to bring claims for financial provision and for the estate assets to be distributed as per any agreement or order under the IHA.

The surviving spouse is the strongest claimant under the IHA. The court will want to ensure that they receive what is "reasonable" with their housing and income needs met as a minimum. In this regard the court will consider the surviving spouse's needs and resources and what they may have received if the marriage had been terminated on divorce instead of death (the notional divorce fiction). In this context the duration of the marriage and contribution made to the family are taken into account as they would in matrimonial proceedings.

However in an IHA context the court also considers the needs and resources of the beneficiaries of the will or on intestacy as well as any other applicant (including anyone who was maintained by/dependent on the deceased immediately before death). The IHA is therefore an entirely different arena in that the proceedings are no longer confined to the spouses. This introduces a whole new dynamic which can, particularly in the case of second families, become fraught with difficulty.

In addition to this, the asset base is likely to change substantially on death.

Assets may pass by survivorship to other parties. Some life insurance policies may come into effect and fall into the estate (becoming available for redistribution under the IHA), but others may well be written in trust for specific individuals and fall outside of the estate.

Likewise pension provisions will change. A pension may have been compared as a capital asset in a divorce, but on death the lump sum and income provisions are likely to be different.

The most significant impact is inheritance tax. To the extent assets fall to non- exempt beneficiaries (the spouse or charities) inheritance tax arises and must be dealt with. It is possible to enter into post-death tax planning, perhaps by making use of the spouse exemption and giving the spouse assets or an interest in some of the assets for a period of time, but that can be unpalatable to beneficiaries and potentially the surviving spouse doesn't want to be beholden to other family members. Often families turn

themselves inside out trying to save inheritance tax but don't give enough thought to the practicalities of living with such an arrangement.

It should of course also be noted that IHA claims are governed by the Civil Procedure Rules and that the usual adverse costs rules apply. This in itself adds complications to negotiations.

Where a spouse dies **after a financial order is made, but before it is put into effect** then it can be dealt with as a debt of the estate. The executors of the estate are responsible for administering the estate and settling debts and will acknowledge and deal with this.

The only problem in this scenario is that there is likely to be a delay. The executors are unlikely to countenance the payment of any sums pending receipt of the grant of probate. It may well take a significant amount of time to obtain a grant and so potentially the surviving spouse could well be waiting a substantial period of time.

In the event of a death **after a financial order is put into effect,** unless the possibility of an IHA claim has been excluded in the financial order altogether, the ex-spouse is still an eligible claimant; albeit the claim is for what is reasonable for maintenance, as opposed to what is just "reasonable", i.e. a less generous standard. (Note the case of Chekov v Fryer [2015] EWHC 1642 (Ch) in which a financial order had excluded an application under the IHA but where the ex-spouse was permitted to bring a claim as a cohabitant -on the basis that the parties had begun living together again after the order.)

With regards to joint life maintenance orders, they clearly end on death. The obligation of the paying spouse does not survive death and fall onto the executors. The survivor would potentially have to bring an IHA claim (if it is not excluded) as an ex-spouse or dependent of the deceased. It is noted that a precedent family order clause can permit an IHA claim limited to only what is necessary to compensate a party for the loss of maintenance. This appears to be a compromise between honouring the financial order, and re-opening the whole negotiation again.

Divorce does not revoke a will so a divorcing party would be advised to make a new will once the decision to divorce is made. It may not be set in stone, and it is subject to an IHA claim that would at the least meet the surviving spouse's needs, but it may well help protect the beneficiaries to a degree. The deceased's wishes are, after all, still a factor to take into account.