How final and irreversible is survivorship in the context of joint tenancies? Where an interest evaporates as a result of the death of a joint tenant, normally it will not be coming back in any shape or form, despite the clear intention of the deceased and even where those intentions are expressed in a will. Once survivorship has operated only statutory provisions will reverse its consequences. Where a will or the rules on intestacy have failed to provide a reasonable level of financial provision for a dependant, a potentially powerful statutory provision which may reverse the effects of survivorship for a person who claims to be a dependant of the deceased is s. 9 of the Inheritance (Provision for Family and Dependants) Act 1975. This section provides that:

(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.

(1A) Where an order is made under subsection (1) the value of the deceased's severable share of the property concerned is taken for the purposes of this Act to be the value that the share would have had at the date of the hearing of the application for an order under section 2 had the share been severed immediately before the deceased's death, unless the court orders that the share is to be valued at a different date.[1]

This provision is not, as was acknowledged early on, as clearly drafted as one would wish.[2] One notable problem is that the phrase "for the purpose of facilitating the making of financial provision" has to be construed widely because of the interrelationship of s.9 with s.3 which lays down the criteria which the court has to take account in deciding whether to make an order under the Act. There are two stages for the court to consider, first in deciding whether there has been reasonable provision provided by the deceased's Will or by the law of intestacy and secondly, assuming that there has not been, what is the appropriate order to make to provide such reasonable provision. It has been decided, and now accepted as uncontroversial[3], that the court has a discretion at the first stage in applying the criteria listed in s.3 of the Act as to whether to include the deceased's severable share (and if so, how much of it) in the net estate in order to determine whether or not reasonable provision for the applicant has been made. Then, if it is of the opinion that it has not, it uses its discretion again to decide what order should be made. A narrow interpretation of the words would have potentially undermined a significant number of applications under the Act in cases where there was a high value property enjoyed by the survivor which was going to be sold at some

[1] Amendments to sub-s. (1) and sub-s. (1A) added in October 2014 by the Inheritance and Trustees' Powers Act 2014 Sch.2 para. 7(2).
[2] See Wood J in *Kourkgy* v *Lusher* (1983) 4 FLR 65
[3] See Lloyd LJ in *Dingmar* v *Dingmar* [2007] Ch 109 at para 19

point in the future, but only a very small estate in liquid assets, because the first issue would have been decided against the applicant.[4]

About half of the reported cases on s. 9 have involved choses in action which are specifically included as being within the scope of the section by s**.** 9(4). The particular chose in action in these cases has been a jointly held life insurance policy where the courts have broadly resolved to hold that they are a jointly owned asset but the valuation of them for the purposes of the Act continues to cause difficulty. The other cases**,** which have involved real property**,** have similarly had problems concerning the value which can be considered as part of the net estate. In an early case, *Jessop* v *Jessop,*[5] Nourse LJ held that it was appropriate to value the share of the deceased at 50% of the value of the property as at the date of death, which was £21,000, despite the fact that the value of a 50% share in the relevant property had quadrupled by the time of the hearing. The order which was subsequently made was that £10,000 of the deceased's share should be considered as part of the net estate and paid to the plaintiff.

As has been reported in this journal, [6] this approach was not followed in the majority decision of the Court of Appeal in *Dingmar* v *Dingmar*[7], where by a majority the Court of Appeal (who did not refer to *Jessop*), held that value did not mean a frozen monetary value at the date of death but essentially meant a proportionate share. This has been made clearer by the amendment provided by s. 1(A). The result being that if it appears just to the court in the circumstances, where a property was previously held by two joint tenants, 50% of the current value of the property is considered to be part of the net estate, not only to consider whether or not reasonable provision has been made but also to inform the decision as to what order to make if it has not been.

The most recent reported case involving consideration of s. 9 is *Ames* v *Jones*[8], a decision of Mr Recorder Halpern in the Central London County Court. Here the 41 year old daughter of the deceased, applied under the Act for reasonable provision, three years after the death of her father. Her father's Will had left his entire estate to his widow, who was not the mother of the applicant. The applicant had two teenage children and was living with her partner. An adult child can bring a claim under the Act, *Ilott v. Mitson* [9] provides guidance the court on such applications. But in practice it is likely that to succeed the applicant is going to have to

[4] See Wood J in Kourkgy v Lusher (1983) 4 FLR 65 at 80
[5] 1992 WL 895622
[6] TEL & TJ 2006, 82(Dec), 17-19
[7] [2007] Ch 109
[8] (2016) WL 04772447
[9] [2012] 2 FLR 170

establish a moral claim. The judge took a highly sceptical view of the evidence of the applicant both in terms of her relationship with the father and her present financial circumstances and was unwilling to accept it unless independently corroborated.

The judge considered the size of the estate for the purposes of sub-para. (e) of s.3. In his consideration of what assets could be included for the purposes of the application he had the only two significant assets before him. First, the former jointly owned matrimonial home and secondly, an investment property which produced a rental income. Where a jointly owned investment property has become vested in the surviving spouse, the question of whether or not to include the deceased's share in the estate might well be balanced by the corresponding swelling of the spouse's resources for the purposes of sub-para.(c) if it is not. But here the judge concluded that the investment property should be included since a half share of the equity amounted to £245,000. Further, 50% of the net rental income from the date of death until the hearing was also to be included, swelling the value to £252,000.

One novel feature of the judgment is the consideration of whether the intention of the parties in holding the property as joint tenants is relevant to the question of whether to include the deceased's share in the net estate. This was, of course, the contention of counsel for the defendant, with the implication that if the parties had intended the right of survivorship to operate then it was a stronger argument in favour of excluding it from the net estate for the purposes of sub-para. (e). The judge decided to include the investment property on the basis that it would be capricious to make the decision dependent on whether the parties had chosen to create a joint tenancy at the date of acquisition and there was no evidence that the parties had addressed their minds to this question and the beneficial joint tenancy had arisen by default. It is submitted that the position is even stronger than merely one of capriciousness. Given the internal logic of the Act it would be odd if an expressed desire to create a joint tenancy could avoid the courts' exercise of discretion under s. 9 essentially allowing of a contracting out of the jointly owned assets. A deceased's tenancy in common interest would automatically be transferred into the net estate and the whole point of s. 9 is to override the normal operation of the law of survivorship. Intentions, it is submitted are therefore irrelevant. Curiously, no there was no discussion of whether there was a beneficial joint tenancy at all, since if it had arisen by default and not expressly, it could well have been subject to the equitable presumption of tenancy in common, where property is acquired for the purpose of a business.[10] The deceased and the defendant had acquired this property partly to let and partly to run a business from selling balloons as equal partners.

[10] Lake v Craddock (1732) 3 P Wms 158;

Ultimately the claim failed because on an examination of the facts in the light of the s. 3 criteria, the applicant was unable to demonstrate to the judge what her current and future needs and resources were, nor why she was not able to work to support herself. The claim also ran into the difficulty that on a consideration of sub-para. (c), that is the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future, because the widow needed the entire estate in order to support herself and was past working age. The judge was of the opinion that it would not be reasonable to expect the widow to sell or grant a further charge over the aforementioned former matrimonial home in which she lived which also provided her only capital and security into the future. The matrimonial home was worth £650,000, subject to a £200,000 mortgage requiring monthly payments of £1,900.

Overall, an encouraging aspect of this case is the willingness of the judge to keep the property which has vested in the survivor and in which she is residing, out of the net estate for section 3(e) purposes. In Kourkgy v Lusher Wood J had held that, in the circumstances of that case, no reasonable person would require the defendant wife/survivor to sell the former matrimonial home in which she was living, and had lived for 23 years. It would probably be of considerable comfort for the survivor to have, for security and clarity, a general exclusion of this type of jointly owned property from s.9. The reason that there is no exclusion is, of course, because there could be a very valuable asset placed into the joint names of the deceased and the survivor, perhaps shortly before, and with the knowledge of, imminent death to avoid the 1975 Act. But it would, it is submitted, be possible to construct an exclusion based on the time at which the property was acquired. Insolvency legislation impugns certain transactions which occur shortly before bankruptcy or winding up.[11]

[11] Eg Insolvency Act 1986, ss. 238 and 239