

**THE IMPACT OF DEATH  
ON FAMILY LAW PROCEEDINGS**

**TELEVISION EDUCATION NETWORK'S  
12<sup>TH</sup> ANNUAL FAMILY LAW CONFERENCE  
AUGUST 2018  
GOLD COAST**

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## INTRODUCTION

Several years ago, I acted for a husband in a family law property matter. He was in his 70s, a senior professional man. The wife was in her 50s. They had one adult child. As sometimes happens, there was not a lot of co-operation from one party, in this case the wife, in pursuing the matter. She was living in the jointly held home. Nothing unusual about this so far. My client, although in good health, was concerned about his future and instructed me to sever the joint tenancy on the home so that he could make provisions for his estate as he chose. I did so. As a result, the wife filed property proceedings.

The husband decided to proceed with an application for divorce. That was heard before he had responded to the wife's property application. On the day we went to the divorce hearing, he informed me in passing that the wife was returning that evening from an overseas trip. The divorce order was made. On we went.

The next day, I had a number of missed calls from the wife's lawyer. I then heard from my client. The wife, on her return to Sydney, aged in her mid 50s, suffered some sort of condition upon exiting the plane (possibly deep vein thrombosis) and died.

And so we found ourselves in the position with which this paper is concerned: the impact of (the wife's) death on the property proceedings (initiated by her).

## LEGISLATIVE BACKGROUND

We start with the matter of *Sims*,<sup>1</sup> a decision of the Full Court of the Family Court of Australia delivered 1 September 1981.

In that case, the husband and the wife were engaged in property settlement proceedings which had been heard. The husband died before judgment was delivered. The Public Trustee had been given leave to intervene on behalf of the husband's estate. The question arose as to whether the property claims had abated as a result of the husband's death. This question had not previously arisen, at least under the *Family Law Act* ("FLA").<sup>2</sup> The Full Court found that:

*"The jurisdiction of this Court is based entirely on statute. Save as expressly provided, this statute does not confer any general power on this Court to entertain*

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<sup>1</sup> *The Marriage of Sims* (1981) FLC 91-072.

<sup>2</sup> *Family Law Act 1975* (Cth).

*proceedings against or by the legal personal representative of a deceased party nor is there power to continue proceedings after the death of a party by substituting that party's personal representative as a party in lieu of the deceased party".<sup>3</sup>*

As such, the proceedings had abated on the husband's death.

In 1983, this problem was corrected when the FLA was amended with the introduction of s79(8) which, in its current form, provides:

*Where, before property settlement proceedings are completed, a party to the marriage dies:*

- (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings;*
- (b) if the court is of the opinion:
  - (i) that it would have made an order with respect to property if the deceased party had not died; and*
  - (ii) that it is still appropriate to make an order with respect to property;**the court may make such order as it considers appropriate with respect to:*
  - (iii) any of the property of the parties to the marriage or either of them; or*
  - (iv) any of the vested bankruptcy property in relation to a bankrupt party to the marriage; and**
- (c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.*

In de facto matters, the relevant section is S90SM(8):

*If a party to the de facto relationship dies after the breakdown of the de facto relationship, but before property settlement proceedings are completed:*

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<sup>3</sup> *The Marriage of Sims* (1981) FLC 91-072.

- (a) *the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and*
- (b) *if the court is of the opinion:*
  - (i) *that it would have made an order with respect to property if the deceased party had not died; and*
  - (ii) *that it is still appropriate to make an order with respect to property;*

*the court may make such order as it considers appropriate with respect to:*

  - (iii) *any of the property of the parties to the de facto relationship or either of them; or*
  - (iv) *any of the vested bankruptcy property in relation to a bankrupt de facto party to the de facto relationship; and*
- (c) *an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.*

Section 79(1A) is also relevant to note:

*An order made under subsection (1) in property settlement proceedings may, after the death of a party to the marriage, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.<sup>4</sup>*

The Family Law Rules include Rule 6.15:

- (1) *This rule applies to a property case or an application for the enforcement of a financial obligation.*
- (2) *If a party dies, the other party or the legal personal representative must ask the court for procedural orders in relation to the future conduct of the case.*

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<sup>4</sup> Family Law Act 1975 (Cth) s. 79A.

(3) *The court may order that the legal personal representative of the deceased person be substituted for the deceased person as a party.*<sup>5</sup>

Note the use of the word “must” in that Rule.

### **The Legal Personal Representative**

The “legal personal representative” of a deceased party generally refers to the executor or administrator of the party’s estate.

In *Strelys*,<sup>6</sup> the husband died after the wife had filed her application for a property settlement. At the time of his death, the husband had not filed a cross application/response but had filed a responding affidavit.

After the death of the husband the wife filed a notice withdrawing her application for a property settlement, in doing so leaving no pending application before the Court. The Full Court found that until the legal personal representative of the deceased husband was substituted as a party in the proceedings, the wife was not entitled to take any further steps in the proceedings, including being prevented from filing her notice of withdrawal.

Until the legal personal representative of the deceased party is substituted as a party to the proceedings, the proceedings are effectively suspended. No further steps can be taken in the case except for the application for substitution of the legal personal representative and the making of procedural orders.

It is possible that, if the deceased party has not updated his or her will, the other spouse is the executor of the deceased’s estate.

If they have been divorced, then the appointment as executor is revoked. In this case, an application for letters of administration with the will annexed can be made by a third party, the most appropriate being the person with the most interest in the estate. This may be someone other than the surviving spouse.

If they are not divorced, then before a grant of probate is made, a person other than the surviving spouse may apply to be appointed executor. If the grant has been made, then an application can still be made for the grant to be revoked.

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<sup>5</sup> *Family Law Rules 2004* (Cth) r 6.15.

<sup>6</sup> *The Marriage of Strelys* (1988) 12 Fam LR 437.

In the event there is no will, an application for letters of administration is made, and again this may be made by someone other than the surviving spouse.

It is clear therefore that proceedings in another court may be required before the Family Court matter resumes.

In *Bailey*,<sup>7</sup> the husband died shortly after the proceedings had commenced. The wife was named as his sole executor and beneficiary. A grant of probate had been made. The wife applied to continue the case in the Family Court, essentially a course which put her on both sides of the record. Nygh J expressed obvious concern about this situation. He considered firstly whether the matter could proceed without the substitution of the legal personal representative, and answered that in the negative. Secondly, he considered whether, as the grant of probate had already been made, a second person be appointed as an administrator *ad litem* by the Supreme Court to act with the wife as executor, but again decided that was not possible. Ultimately, he determined that the only course was to follow s79(8) and substitute the wife as the executor for the husband's estate. He also noted the undertaking of the wife not to settle the proceedings without the approval of the court or the consent of intervenors (who had commenced proceedings against the husband in the Supreme Court seeking damages for other issues).

As to whether it is necessary to have a grant of probate before the appointment of the LPR in the proceedings, Cronin J in *Murdoch* did not think it so:

*“Rule 6.15 of the Family Law Rules requires the legal personal representative to ask for procedural orders, and the Court may substitute the legal personal representative for the deceased, as a party. Nothing in that rule alters the legal position of the legal personal representative obtaining his or her rights from the will. Procedural orders are, in effect, an authentication of the legal personal representative's position. Thus, it is not critical that probate be granted unless a party joins issue with a legal personal representative as to their title under the will. There have been examples of this Court where this Court has adjourned proceedings to await a grant of probate, but they refer to the executors regularising their legal position. See, for example, Korsky & Bright & Anor [2007] FamCA 245, and specifically at paragraph 20.*

*The suspension of the proceedings, as I have indicated, however, does not obviate the fact that the executor still has the right, the entitlement, and the responsibility*

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<sup>7</sup> *Bailey & Bailey* (1987) FLC 91-803

*from the will, pending the authentication by the probate. As such, nothing I have found suggests that a legal personal representative cannot be appointed before probate is granted, provided there is no suggestion that the other party joins issue with the entitlement under the will'.<sup>8</sup>*

## **PRELIMINARY PRINCIPLES**

1. Can proceedings be commenced after the death of a spouse?

No. The proceedings must have been commenced before the death of one of the spouses. This is clear from the wording of s79(8).

If the parties have separated, but proceedings have not yet been commenced before the death of one of them, the surviving spouse may make an application for provision from the deceased's estate. This is discussed later in this paper.

2. One or both deceased?

If both parties die before final orders are made in the proceedings, then the proceedings will not continue.

This question was considered by his Honour Le Poer Trench J in the case of *Estate of Mackenzie (Deceased)*.<sup>9</sup> Proceedings were commenced by the husband in 2003 and responded to by Public Guardian, on behalf of the wife, she having been found to be incapable of managing her own affairs. The husband died in 2004. The executor of his will was appointed as the LPR of the husband for the purpose of the proceedings. The wife died intestate in 2006. Her niece was the LPR for the wife for the purposes of these proceedings. There was also an intervenor, being a woman claiming to have lived in a de facto relationship with the husband and who had a claim under the *Family Provision Act 1982* pending as against the husband's estate. The husband's estate was valued at about \$11,000 and the wife's estate at about \$290,794. Le Poer Trench J relied on the ordinary meaning of the words in the section, and on the High Court's decision in *Fisher*,<sup>10</sup> which determined the constitutional validity of s79(8), to support his decision that the death of both parties brings the Court's jurisdiction to an end.

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<sup>8</sup> Murdoch & Brown (No 2) [2013] Fam CA 732 [13] & [14].

<sup>9</sup> *Estate of Mackenzie (Deceased) & Estate of Mackenzie (Deceased) and Anor* [2007] FamCA 882.

<sup>10</sup> *Fisher v Fisher (No 2)* [1986] HCA 61.

This question was also considered, although in a slightly different way, in the case of *Whitehouse*.<sup>11</sup> There an application was made by the husband for property settlement. The wife also sought orders for property settlement. The husband died. Later, the wife died; but before doing so she had amended her application to seek orders which invoked the Court's accrued jurisdiction. After the death of both parties, the court had no further federal jurisdiction and therefore nothing to which the accrued jurisdiction could attach.<sup>12</sup>

It is useful here to consider the facts in *Stanford*.<sup>13</sup> In that case, the proceedings were commenced on behalf of the wife by her daughter as case guardian. Final orders were made by the Magistrates Court of Western Australia at a time when both the husband and the wife were still alive. The husband appealed those orders to the Full Court of the Family Court. The wife died after the appeal had been heard, but before judgment had been delivered. The husband appealed the decision of the Full Court to the High Court. We will look at *Stanford* further below in relation to the 2 step process of s79(8).

### **APPLICATION OF s79(8)**

Once the LPR has been substituted, and the proceedings are continuing, the section requires a 2 step analysis.

Firstly, would the court have made an order with respect to property if the party had not died? And secondly, is it still appropriate to make an order?

The majority in *Stanford* summarised this as follows:

*Both of those inquiries require consideration of s79(2) and its direction that the court **not** make an order unless "satisfied that, in all the circumstances, it is just and equitable" to do so. It follows that, in cases where s79(8) applies, a court must consider whether, had the party not died, it would have been just and equitable to make an order and whether, the party having died, it is **still** just and equitable to make an order.*<sup>14</sup>

Remember that both at first instance by the Magistrate, and on appeal by the Full Court, a property settlement order was made. The Full Court found that the "*many years of marriage*

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<sup>11</sup> *Whitehouse & Whitehouse* [2009] Fam CAFC 207

<sup>12</sup> This case also expresses doubt as to whether s79(8) applies to applications for declarations under s78.

<sup>13</sup> *Stanford & Stanford* [2012] HCA 52

<sup>14</sup> *Ibid* [24]



*and the wife's contributions demand that those moral obligations be discharged by an order for property settlement".<sup>15</sup>*

But neither Court had considered, as it was required to do by s79(8), whether, had the wife not died, it would have made an order, nor whether it was still appropriate to make an order after her death. As we know, the High Court warned against conflating the matters in s79(4) with the principle of making an order when it is just and equitable to do so, pursuant to s79(2). Those enquiries are separate.

In response to the "*moral obligations*" referred to by the Full Court, the High Court said:

*Whether it was just and equitable to make a property settlement order in this case was not answered by pointing to moral obligations. Reference to "moral" claims or obligations is at the very least apt to mislead. On its face, the invocation of moral claims or obligations assumes rather than demonstrates the existence of a legal right to a property settlement order and further assumes that the extent of that claim or obligation can and should be measured by reference to the several matters identified in s 79(4). Second, the term "moral" might be used to refer to a claim or obligation that is based on the kind of contribution described in s 79(4)(b) – "the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage ... to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them". But nothing is gained by describing such a contribution as founding a "moral" claim or obligation. Moreover, if the word "moral" was being used in this context with some wider meaning or application, it is important to recognise that it is used in a way that finds no legal foundation in the Act or elsewhere. It is, therefore, a term that may, and in this case did, mislead. The rights of the parties were to be determined according to law, not by reference to other, non-legal considerations.<sup>16</sup>*

As we know, the husband's appeal in *Stanford* was successful. While we remember that case for its analysis of s79(2) and its relationship with s79(4), it is also an important decision in terms of the proper interpretation of s79(8).

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<sup>15</sup> *Stanford & Stanford* (2011) FLC 93-495 [52]

<sup>16</sup> *Stanford & Stanford* [2012] HCA 52 [52].

## **The first question:**

### **Timing**

The court must determine whether an order would have been made if the party had not died, but what is the relevant time for that enquiry?

In *North*,<sup>17</sup> Gee J concluded that the relevant time was the day before the party's death.

In *Doyle*,<sup>18</sup> Lindenmayer J preferred an interpretation of s79(8)(b)(i) that considered the relevant date the day of the hearing.

It seems that this question now has less significance in the overall consideration of the

### **Order**

Does the court have to determine the specific order it would have made if the party had not died?

No – see *Menzies*,<sup>19</sup> where it was noted the section refers to “an order” not “the order”, and it does not have to be the same order.

The death of one of the spouses is likely to bring about a different consideration not only of s75(2) factors but also contributions, depending on the particular facts of the case, than would have been the case had the party not died. Therefore, it is understandable that the court does not have to determine the order it would have made, in some hypothetical set of circumstances in which the deceased spouse is resurrected.

Following *Stanford*, the court does have to find that it is just and equitable to make an order.

## **The second question: still appropriate**

If the court would have made an order, it must then decide if it is still appropriate to make an order.

What factors might be relevant to the issue of “still appropriate”? The contributions made by the survivor, particularly to any minor children, will be relevant. The future maintenance

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<sup>17</sup> *North & North* (1987) FLC 91-831.

<sup>18</sup> *Doyle & Doyle (deceased)* [1989] FamCA 7.

<sup>19</sup> *Menzies & Evans* (1988) FLC 91-969.

needs of the children and the surviving spouse will also be relevant. He or she may have greater s75(2) needs as a consequence of the other spouse's death.

Similarly, no s75(2) factors are relevant in the case of the deceased. This in itself may mean that it is not "still appropriate" to make an order, if for example, the deceased's case was primarily based on future needs.

An analysis of the assets and liabilities may also disclose that the surviving spouse has received benefits from the estate or by virtue of survivorship, such that it is no longer appropriate to make any further order.

The conduct of the parties during the course of the proceedings may also be relevant. In *Doyle*, Lindenmayer J referred to the husband's non-disclosure, leading to considerable delay in the hearing of the proceedings, as a relevant factor. The wife died before the matter could be heard and His Honour considered it an injustice to the wife, and indirectly to the children, if the husband profited from the delay.

In that case, Lindenmayer J also noted:

*It must be presumed, from the enactment of sec. 79(8), that the legislature intended that one party to a marriage which has broken down to the point that proceedings have been commenced for orders altering the interests of the parties in property should not profit by the fortuitous death of the other party prior to the determination of those proceedings.<sup>20</sup>*

## **IN PRACTICE**

A recent case which encapsulates many of the points raised above is *Meddow*,<sup>21</sup> a decision of Le Poer Trench J in late 2015.

The parties cohabited for a period of about 16 years (depending on the date of separation). There were 2 young children, twins. They lived with the wife. The wife was diagnosed with breast cancer in 2007. Proceedings were commenced in 2011 by the husband. The wife's health deteriorated in 2012. She was assisted from time to time by her parents, who otherwise lived in Canada. In 2014 the matter came on for hearing. At trial the wife's life

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<sup>20</sup> *Doyle & Doyle (deceased)* [1989] FamCA 7 [5].

<sup>21</sup> *Meddow & Estate of the late Ms Meddow* [2015] Fam CA 1182.

expectancy was said to be 1 – 2 years. In fact she died within 5 months of the hearing, in September 2014. Orders had not yet been made.

The children went to live with the husband and his new partner. At that time they were aged 8 years.

The wife's parents were the executors of her estate and were substituted for her in the proceedings.

There was a further hearing in March 2015, and judgment and final orders made in November 2015.

### **Evidence**

In this case, the wife had filed affidavit evidence and had been available for cross examination. Her treating doctors had also provided affidavits in her case, particularly as to her life expectancy.

In other cases, the gathering of evidence may present significant problems, if an affidavit as to the party's contributions and other relevant matters has not been prepared prior to the death of that party. In those circumstances some creativity will be needed to prepare the evidence for a final hearing. For example, there may be other close relatives or friends who have direct knowledge of certain events and can give that evidence. There may be evidence available from primary source documents.

The admittance into evidence of an affidavit if the maker is deceased and not available is discretionary.

Benjamin J in *Neubert* stated that he has the discretion under the *Evidence Act* to admit the evidence:

*Counsel for the representative submitted that given the provisions of s 63 and s 67 of the Evidence Act 1995 (Cth) ('the Evidence Act') and notice having been given to the husband the evidence of the late wife should be admitted. Only short notice was given to the unrepresented husband of the use of this material. I find that such notice was not reasonable notice.*

*However, given the circumstances of the late wife being unavailable and that the husband had known of the wife's affidavit for many years and had responded to it, I exercise my discretion and admit the evidence<sup>22</sup>*

The deceased party not being available for cross examination does not necessarily mean that the surviving spouse's credit is not in issue.

## **Property**

In this case an issue arose as to whether the Court could make a superannuation splitting order in favour of the wife's estate.

In accordance with a direction made after the second hearing, the parties approached the trustee of the husband's superannuation fund to enquire as to whether it would facilitate such an order. The response from the trustee was that it would do so.

The husband's superannuation in the growth phase, was found to be property for the purposes of s79(8) and included in the pool of property available for division. A splitting order was made, with the resulting cash being received by her estate.

*Stanford* reminds us that we must identify the parties' existing legal and beneficial interests in property. In the case where one party has died, this will require disclosure of the assets and liabilities of the deceased's estate, the assets and liabilities held jointly with the surviving spouse and the assets and liabilities in the sole name of the survivor. If the surviving party has benefited financially from the other's death, such as for example, an insurance benefit, or transfer of assets by virtue of survivorship, this will be reflected in the Balance Sheet and may be relevant to the question of whether it is still appropriate to make any order. Alternatively, the circumstances of the case may require a transfer of assets to the estate.

## **Assessments**

In the first hearing, while the wife was alive, the husband sought a 66% adjustment for contributions in his favour, and 10-15% adjustment for s75(2) factors.

The wife sought a division that worked out overall at about 47 – 48% of the pool. It was contended on her behalf that there be no s75(2) adjustment. It was also submitted on her behalf that her objective was to ensure that the children would directly benefit from her

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<sup>22</sup> *Neubert & Neubert (deceased) and Anor (No 2)* [2017] FamCA 829 at [40] and [41]

estate. The wife established testamentary trusts for the children for school fees and other costs, but these did not include the children's day to day maintenance.

In the second hearing the husband maintained the 66% adjustment on contributions, and overall sought 75% of the pool. He relied on his sole obligation to support the children. By this time, the relationship between the husband and the wife's parents, who were the trustees of the testamentary trusts, was poor.

The trial judge found contributions 65/35 in favour of the husband. This was primarily because of the husband's greater initial contributions.

On s75(2) factors, the judge made a 7% adjustment in favour of the husband, and made the following remarks:

*The death of the wife has significant implications for my findings regarding the future needs matters to be considered pursuant to s 75(2) and the overall justice and equity of any orders made. The burden of financially and emotionally supporting the children will now fall entirely on the husband. The wife does not have any future needs factors to be taken into account in her favour when making an adjustment pursuant to s 75(2). Since the death of the wife, the husband has also unavoidably made a greater contribution to the welfare of the family by virtue of him undertaking the role of homemaker and sole parent for the children. I do need to refer at this point to my view that the Court does have to take into consideration that the wife has a right to testamentary disposition and in this case the actual provisions of the wife's will creating trusts for each of the children need to be considered under s 75(2). I also have regard to the words of Lindenmeyer J in Doyle that the enactment of s 79(8) creates a presumption that "the legislation intended that one party to a marriage which has broken down to the point that proceedings have been commenced for orders altering the interests of the parties in property should not profit by the fortuitous death of the other party prior to the determination of those proceedings."<sup>23</sup>*

In a case where a spouse has not died, but has a short or limited life expectancy, this will be relevant under s75(2). That party's needs may be capable of quantification. It will also be relevant to the other party's s75(2) factors, if for example, the imminent death of the spouse will, as in the case of *Meddow*, mean that the surviving party has sole care of the children.

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<sup>23</sup> *Meddow & Estate of the late Ms Meddow* [2015] Fam CA 1182 [606].

## Another Point of Interest

In *Meddow* and in another matter *Nimett*<sup>24</sup>, the relationship between the surviving spouse and the executors were important factors, with consequences for the final assessment of division and, in *Nimett*, for the form of the final orders made.

In *Nimett*, the husband and wife operated a farming property. They had 2 children. After separation the wife left the property and the husband continued to operate the farming business. When the husband became ill and was hospitalised, the wife returned to the property, at his request, and took on the running of the property. The husband subsequently died. Proceedings had been commenced by the wife a few months before.

Following the husband's death, the wife and the children continued to live on the property and the wife continued running the business.

The executors of the husband's estate, who were then substituted for him in the proceedings, were friends of the husband. The estate was left to the children.

It is apparent from the reasons for judgment that the relationship between the wife and the executors deteriorated significantly, and in circumstances where she was endeavouring to run the business in a rural community.

The main asset was the rural property. The options available to finalise the matter, as put by the parties, were:

1. A sale of the property and a division of the proceeds as between the wife and the estate
2. A subdivision of the property with the wife retaining the right to lease the estate's portion on commercial terms
3. A transfer to the wife of a certain share, as tenant-in-common with the remaining share being held by her on trust for the children, or alternatively by executors.

The trial judge found contributions to be 70/30 in the husband's favour. On s75(2) factors, a further 10% was awarded to the wife, being a 60/40 division overall in the husband's estate favour.

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<sup>24</sup> *Nimett & Estate of Nimett (deceased)* [2007] FamCA 1189.

Given the poor relationship between the wife and the executors, the trial judge found that there was no realistic prospect of a co-operative working relationship between them. This meant that an arrangement whereby they operated the business in partnership was not available.

A sale would deprive the children, then aged about 16 and 15, of the only home they had known, and also the opportunity to make their own decisions as to their future and the future of the property. The court noted that the children were to take their entitlements under the will at the age of 25.

Instead, the court preferred an arrangement whereby the children's interest could be held in trust by the wife for the children until they reached 25 years and relied on s79(1) to do so. That section enables the settlement or transfer of property for the benefit of a child of the marriage. The trial judge noted:

*Here there are a number of considerations relevant to an order settling upon the children the estate's 67.5% share of the O property which, as discussed earlier, are supported at the least by s 75(2)(o):*

- *The property is the home where both children were born and where they have lived all their lives.*
- *It is apparent from the evidence that G, at least, is desperately keen to see that the property is not sold but retained within the family.*
- *To remove the children from their home, without compulsion for sale, would very likely destabilise them [if G's correspondence directed to the executors is any indicator] for no good reason.*
- *There is no compelling need for the children to be deprived of the use and enjoyment of the property over the years between now and attaining the age of 25 years by selling it now because there is an alternative.*
- *Their mother can continue to run the property competently, as she apparently does, and so provide for herself and for them until they take their interest at the age of 25 years. At that point they can decide, as a family of three adults each with their own proportionate ownership, what is to happen to the O property.*



- *Their mother, who is their sole guardian with sole parental responsibility for their upbringing, can be relied upon to be cognisant of their needs and to act in their best interests. As she is in that singular position, it can be accepted that her application to hold their interest in the O property in trust does not fall into the circumstances considered by the Full Court in *Spellson v Spellson and Others* (1989) FLC 92-046 [Murray, Lindenmayer and Walsh JJ] where the adult child for whose benefit the application was made did not support it, thereby leading to the dismissal of the application as frivolous, vexatious or an abuse of the court's process.*
- *Finally, it is apparent that their father envisaged the O property being retained for their benefit, whatever the terms of his Will. In her evidence Mrs Wylder relates [paragraph 85] a statement from the children's father to the effect of the O property being run and maintained 'for the kids'. She relates another conversation with him in November 2004 to the effect that if something should happen to him 'the property would be maintained for the children until they reach the age of 25. Hopefully by this time they will be mature enough to make the right decision.' Also [paragraph 30] Mrs Wylder refers to another conversation about building up off farm assets for retirement 'and so enable the farm to be passed to one of my children, and still allow for sufficient assets for the other child upon [the mother's] and my death'.*

*As it happens, it is impossible for the executors and the wife to run the property over the coming years. But the children can receive the benefit of their share of the O property through an order made pursuant to s 79(1), upon the same trusts as those created by the Will and with their mother appointed trustee. Only in that way can a sale be avoided and the O property retained, thereby providing for the children options about the use and retention of the O property to abide the time when they are in a position to make those decisions conjointly with their mother. In my opinion, that is the just and equitable outcome in this case.<sup>25</sup>*

## **WHEN S79(8) DOES NOT APPLY**

If, after separation, one party dies before proceedings have been commenced, property settlement proceedings are no longer an available option. Instead, the surviving spouse must turn to the family provision legislation relevant to him or her.

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<sup>25</sup> *Nimett & Estate of Nimett (deceased)* [2007] FamCA 1189 [104] and [105].

## The relationship between the Family Law Act and family provision claims on the death of a spouse

As Justice Paul Brereton RFD noted in his paper to the National Family Law Conference in Perth in October 2006,<sup>26</sup> noted “there are not infrequently occurring circumstances in which the operation of one closely bears on the other.” He identifies 4 such circumstances:

1. where it is open to a surviving spouse to prosecute proceedings under both Acts;
2. where a surviving spouse or former spouse has not instituted property proceedings before death;
3. where after a property settlement one party dies and the other seeks to make a family provision claim; and
4. giving effect to the clean break principle by the release of rights to make a family provision application

### State legislation

While there are differences between the State’s family provision laws, in general terms one needs to carefully consider preliminary jurisdictional issues such as:

1. the domicile of the parties
2. the location of the property
3. the time in which an application must be made
4. whether the applicant meets the definition of an eligible person. Each state has its own definition of an eligible person or the class of persons who can make a claim for family provision. Usually the definitions in all states refer to the spouse or de facto partner of the deceased at the time of death, and children of the deceased.

In **NSW** the relevant Act is the *Succession Act 2006*.<sup>27</sup> Section 57 defines eligible persons who may apply for an order for family provision: 57(d) refers to “*a former spouse of the deceased person*”. However, s59 provides that the court may make an order if it is satisfied that, firstly, the claimant is an eligible person, and secondly, if the person is an eligible person only because of sub-section (d) [or (e) or (f)] there are factors warranting the making of an application having regard to all the circumstances of the case, whether past or present.

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<sup>26</sup> Justice Paul LG Brereton, ‘Where death and divorce meet: the intersection of family provision and family law’, (Speech to the National Family Law Conference October 2006).

<sup>27</sup> *Succession Act 2006* (NSW).

Note that the first issue is whether there are factors warranting the making of an application, and secondly whether it is appropriate to make an order.

An application for family provision must be made within 12 months of the deceased's death, unless otherwise ordered or agreed (s58).

The matters the court is to have regard to in determining whether the person is an eligible person and whether to make an order and the nature of any order are contained in section 60(2):

*The following matters may be considered by the Court:*

- (a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,*
- (b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,*
- (c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,*
- (d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,*
- (e) if the applicant is cohabiting with another person--the financial circumstances of the other person,*
- (f) any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,*
- (g) the age of the applicant when the application is being considered,*

- (h) *any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,*
- (i) *any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,*
- (j) *any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,*
- (k) *whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,*
- (l) *whether any other person is liable to support the applicant,*
- (m) *the character and conduct of the applicant before and after the date of the death of the deceased person,*
- (n) *the conduct of any other person before and after the date of the death of the deceased person,*
- (o) *any relevant Aboriginal or Torres Strait Islander customary law,*
- (p) *any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.*

The similarities between some of these factors, and s79(4) and s75(2) of the FLA, are notable.

A recent case which considered the claim of a former spouse is the matter of *Lodin*.<sup>28</sup>

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<sup>28</sup> *Lodin v Lodin* [2017] NSWCA 327

In *Lodin*, Sackville AJA under a sub heading “Some Propositions” said that:

*It follows from Dijkhuijs that care must be taken not to impose rigid constraints on the circumstances that might constitute factors warranting a former spouse of the deceased making an application for family provision from the estate. Nonetheless it is difficult to see how a former spouse could satisfy s 59(1)(b) of the Succession Act simply by relying on the existence of the marriage and the fact that he or she now has unmet financial needs. The reason is that these factors alone do not demonstrate that the deceased had a social, domestic or moral obligation to make testamentary provision for the former spouse. The position is unlikely to be different even if the estate is relatively large. Something more is ordinarily needed for the claimant to show that he or she was a natural object of testamentary recognition.*

*What more a claimant must show cannot be defined with precision since all the circumstances have to be taken into account. Some cases may be comparatively straightforward. An example commonly given is where the claimant and the deceased, although divorced, had not reached a financial settlement prior to the deceased's death.<sup>[72]</sup> Other cases, such as *Dijkhuijs*, may involve a considerably more difficult evaluative judgment.*

*One matter of significance is whether the claimant and deceased finalised their financial relationship at the time of the divorce or subsequently, whether by agreement or by means of court orders (as occurred in the present case after contested hearings). As *Dijkhuijs* shows, a final property settlement is not necessarily an absolute bar to a family provision application being considered on its merits, but in most cases such a settlement, if otherwise unimpeachable, is likely to terminate any obligation on the deceased to make testamentary provision for his or her former spouse.*

*Another significant matter is likely to be the nature of the relationship between the claimant and the deceased. In particular, it may be very important to determine whether there were (or are) features of that relationship that can be said to create a moral obligation on the deceased to make testamentary provision for the claimant. In this respect considerable care needs to be taken to prevent a family provision claim becoming a forum for litigating questions of matrimonial fault long since removed from family law. Nonetheless the conduct of the deceased may be relevant to the question posed by s 59(1)(b) of the Succession Act if, for example, physical or sexual*

*abuse during the marriage (or later) has caused the claimant to suffer a physical or psychological disability impairing his or her capacity to earn an adequate income.*<sup>29</sup>

In **South Australia** it is the *Inheritance (Family Provision) Act 1972*.<sup>30</sup> Sec 6 of that Act provides that the spouse, the domestic partner, or a person who has been divorced from the deceased person are entitled to claim a benefit. This does not specifically refer to a person who was the former domestic partner of the deceased, however s4 defines domestic partner:

*"domestic partner", in relation to a deceased person, means—*

- (a) *a person declared under the Family Relationships Act 1975 to have been the domestic partner of the deceased as at the date of the deceased person's death, or at some earlier date; or*
- (b) *a person who was in a registered relationship with the deceased as at the date of the deceased person's death, or at some earlier date;*

In *Burke v Public Trustee & Ors*,<sup>31</sup> the court considered a claim made by the former wife of the deceased. The parties had divorced, and apparently entered into an informal property settlement. There was a period of about 14 years between their separation and the husband's death. The applicant was an eligible person, she having been divorced from the deceased. The trial judge followed the *Singer v Berghouse [No 2]* 2 stage process:

1. Whether the applicant has been left without adequate provision for her proper maintenance, education and advancement in life; and if yes
2. What provision should be made from the estate of the deceased.<sup>32</sup>

In doing so, the judge noted that "*There are no hard and fast rules as to the attitude of the court to claims by divorced wives.*"<sup>33</sup> And "*Factors relevant to a claim by a divorced wife include the culpability of the deceased in relation to the grounds of divorce, the length of time from the separation of the spouse to the death of the former husband, and the course which the lives of the two spouses have followed since separation.*"<sup>34</sup>

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<sup>29</sup> *Lodin v Lodin* [2017] NSWCA 327 [126] to [129].

<sup>30</sup> *Inheritance (Family Provision) Act 1972* (SA).

<sup>31</sup> *Burke v Public Trustee & Ors* [1997] SASC 6423.

<sup>32</sup> *Singer v Berghouse [No 2]* [1994] HCA 40.

<sup>33</sup> *Ibid* [5].

<sup>34</sup> *Ibid* [6].

In respect of the relationship between family law proceedings and outcomes, and an application for family provision, the trial judge said:

*A settlement upon the dissolution of the marriage is not a bar to the plaintiff's claim: Re Estate of Brooks (supra) at 403; Re Mayo deceased [1968] 2 NSWLR 709 at 712; Dijkhuijs v Barclay (1988) 13 NSWLR 639, but the terms of the settlement are nevertheless relevant in determining the plaintiff's need and the extent to which it may have been satisfied in the deceased's lifetime. As Kirby P explained in Dijkhuijs v Barclay at 652, the public policy in finality of financial dealings by property settlement ordered by the Family Court must be read in conjunction with the competing public policy that, in certain circumstances, former spouses may seek orders for provision under the Act. Whether provision will be made and the nature of the provision will depend on the facts and circumstances of each case. So the divorce and any settlement of property lead the court to exercise "a carefully guarded discretion": Re Preece [1947] SASRp 19; [1947] SASR 134; Re Estate of Brooks (supra) at 404.<sup>35</sup>*

In **Victoria**, section 90 of the Administration and Probate Act 1958 defines an "eligible person" and at (e) includes a former spouse or former domestic partner of the deceased if the person, at the time of the deceased's death the person:

- (a) would have been able to take proceedings under the FLA; and
- (b) has either:
  - a. not taken those proceedings; or
  - b. commenced but not finalised those proceedings; and
- (c) is now prevented from taking or finalising those proceedings because of the death of the deceased.<sup>36</sup>

An application must be made within 6 months after the grant of probate or letters of administration, unless otherwise ordered (s99).

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<sup>35</sup> Ibid [7].

<sup>36</sup> Administration and Probate Act 1958 (Vic)

Section 91 is in the following terms:

- (1) *Despite anything to the contrary in this Act, on an application under section 90A, the Court may order that provision be made out of the estate of a deceased person for the proper maintenance and support of an eligible person.*
- (2) *The Court must not make a family provision order under subsection (1) unless satisfied—*
  - (a) *that the person is an eligible person; and*
  - (b) *in the case of a person referred to in paragraphs (h) to (k) of the definition of "eligible person", that the person was wholly or partly dependent on the deceased for the eligible person's proper maintenance and support; and*
  - (c) *that, at the time of death, the deceased had a moral duty to provide for the eligible person's proper maintenance and support; and*
  - (d) *that the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person, whether by—*
    - (i) *the deceased's will (if any); or*
    - (ii) *the operation of Part IA; or*
    - (iii) *both the will and the operation of Part IA.*
- (3) *For the purposes of subsection (2)(b), the Court must disregard any means-tested government benefits that the eligible person has received or is eligible to receive.*
- (4) *In determining the amount of provision to be made by a family provision order, if any, the Court must take into account—*
  - (a) *the degree to which, at the time of death, the deceased had a moral duty to provide for the eligible person; and*
  - (b) *the degree to which the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person; and*
  - (c) *in the case of an eligible person referred to in paragraph (f) or (g) of the definition of "eligible person", the degree to which the eligible person is not*



*capable, by reasonable means, of providing adequately for the eligible person's proper maintenance and support; and*

*(d) in the case of an eligible person referred to in paragraphs (h) to (k) of the definition of "eligible person", the degree to which the eligible person was wholly or partly dependent on the deceased for the eligible person's proper maintenance and support at the time of the deceased's death.*

*(5) The amount of provision made by a family provision order—*

*(a) must not provide for an amount greater than is necessary for the eligible person's proper maintenance and support; and*

*(b) in the case of an eligible person referred to in paragraphs (h) to (k) of the definition of "eligible person", must be proportionate to the eligible person's degree of dependency on the deceased for the person's proper maintenance and support at the time of the deceased's death.*

Section 91A sets out the factors to be considered in making an order, and again we can see the similarities with the FLA:

*(1) In making a family provision order, the Court must have regard to—*

*(a) the deceased's will, if any; and*

*(b) any evidence of the deceased's reasons for making the dispositions in the deceased's will (if any); and*

*(c) any other evidence of the deceased's intentions in relation to providing for the eligible person.*

*(2) In making a family provision order, the Court may have regard to the following criteria—*

*(a) any family or other relationship between the deceased and the eligible person, including—*

*(i) the nature of the relationship; and*

*(ii) if relevant, the length of the relationship;*

- (b) *any obligations or responsibilities of the deceased to—*
  - (i) *the eligible person; and*
  - (ii) *any other eligible person; and*
  - (iii) *the beneficiaries of the estate;*
- (c) *the size and nature of the estate of the deceased and any charges and liabilities to which the estate is subject;*
- (d) *the financial resources, including earning capacity, and the financial needs at the time of the hearing and for the foreseeable future of—*
  - (i) *the eligible person; and*
  - (ii) *any other eligible person; and*
  - (iii) *any beneficiary of the estate;*
- (e) *any physical, mental or intellectual disability of any eligible person or any beneficiary of the estate;*
- (f) *the age of the eligible person;*
- (g) *any contribution (not for adequate consideration) of the eligible person to—*
  - (i) *building up the estate; or*
  - (ii) *the welfare of the deceased or the deceased's family;*
- (h) *any benefits previously given by the deceased to any eligible person or to any beneficiary;*
- (i) *whether the eligible person was being maintained by the deceased before that deceased's death either wholly or partly and, if the Court considers it relevant, the extent to which and the basis on which the deceased had done so;*
- (j) *the liability of any other person to maintain the eligible person;*
- (k) *the character and conduct of the eligible person or any other person;*

- (l) *the effects a family provision order would have on the amounts received from the deceased's estate by other beneficiaries;*
- (m) *any other matter the Court considers relevant.*

In **Queensland** it is the Succession Act 1981.<sup>37</sup> The definitions here, and ascertaining whether a former spouse is eligible, are a little more complicated.

The family provision sections are contained in Part 4.

Pursuant to s5AA, a spouse is:

- (1) Generally, a person's "**spouse**" is the person's—
  - (a) *husband or wife; or*
  - (b) *de facto partner, as defined in the Acts Interpretation Act 1954 (the "AIA" ), section 32DA ; or*
  - (c) *civil partner, as defined in the AIA, schedule 1.*
- (2) *However, a person is a "**spouse**" of a deceased person only if, on the deceased's death—*
  - (a) *the person was the deceased's husband or wife; or*
  - (b) *the following applied to the person—*
    - (i) *the person was the deceased's de facto partner, as defined in the AIA, section 32DA ;*
    - (ii) *the person and the deceased had lived together as a couple on a genuine domestic basis within the meaning of the AIA, section 32DA for a continuous period of at least 2 years ending on the deceased's death; or*
  - (ba) *the person was the deceased's civil partner; or*

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<sup>37</sup> Succession Act 1981 (Qld).

© **for part 4, the person was—**

- (i) a person mentioned in paragraph (a), (b) or (ba); or**
- (ii) the deceased’s dependant former husband or wife or civil partner.**

We then go to s5AA (4) which defines “*dependent former husband or wife or civil partner*” as:

(a) *a person who—*

- (i) was divorced by or from the deceased at any time, whether before or after the commencement of this Act; and*
- (ii) had not remarried or entered into a civil partnership with another person before the deceased’s death; and*
- (iii) was on the deceased’s death receiving, or entitled to receive, maintenance from the deceased; or*

(b) *a person who—*

- (i) was in a civil partnership with the deceased that was terminated under the Civil Partnerships Act 2011 , section 19; and*
- (ii) had not married or entered into another civil partnership before the deceased’s death; and*
- (iii) was on the deceased’s death receiving, or entitled to receive, maintenance from the deceased.*

“Maintenance” is not defined.

Ss41(1) and (2) then provide as follows:

- (d) If any person (the “**deceased person**”) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person’s spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit*

*shall be made out of the estate of the deceased person for such spouse, child or dependant.*

(1A) *However, the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before the deceased person's death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant.*

(2) *The court may—*

(a) *attach such conditions to the order as it thinks fit; or*

(b) *if it thinks fit—by the order direct that the provision shall consist of a lump sum or a periodical or other payment; or*

© *refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.*

Applications in Queensland must be brought within 9 months of the deceased's death (s41(8)).

In *Alagiah v Crouch as administrator of the estate of Ratnam Alagiah (deceased)*,<sup>38</sup> the parties had been married for 22 years. They divorced in 2012 although it appears they were separated since 2006. The husband died in early 2013. No property settlement proceedings had been commenced, and it appears that negotiations for settlement were continuing.

The wife was living in India and had been since 2006. She was not receiving financial support from the husband prior to his death.

Her application for provision from the estate was brought out of time. She therefore required leave. That question involved consideration of:

1. explanation for the delay
2. whether there was any prejudice to beneficiaries
3. any unconscionable conduct by the applicant

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<sup>38</sup> *Alagiah v Crouch as administrator of the estate of Ratnam Alagiah (deceased)* [2015] QSC 281

4. the strength of the applicant's case.

The trial judge was satisfied by the reasons for the delay. The real issue arose as to whether the applicant met the definition of spouse in s5AA (as set out above). In particular was she "receiving or entitled to receive, maintenance from the deceased." Clearly, she was not receiving maintenance from the husband before his death. Was she entitled to maintenance?

The applicant sought to rely on s72 of the FLA in support of an argument that she was entitled to receive maintenance. But that is a conditional liability in that it requires the Court to determine whether or not an order should be made. After reviewing various cases, and by reference in particular to *Re Lack*,<sup>39</sup> and *Dobell v Van Damme*,<sup>40</sup> the trial judge in this case noted that what was required was "*an actually crystallized right*" to maintenance by virtue of an order or agreement. As no such entitlement existed here, the application was unsuccessful.

## IN SUMMARY

A party's rights may be significantly adversely affected by the death of the other party, whether or not family law proceedings for property settlement have been commenced.

If property proceedings have been commenced in the Family Courts, consider (these apply irrespective of which "side" you are on):

1. who will be appointed as the deceased's legal personal representative;
2. does any application need to be made to another court in respect of grant of probate or letters of administration;
3. is there any need for an ongoing relationship between the surviving spouse and the executors, and if so, how will that be managed;
4. who will arrange for the matter to be relisted for procedural directions;
5. what effect, if any, has the person's death had on the asset pool;
6. what changes, if any, has the death caused to the surviving party which may impact that party's s75(2) factors;
7. has any evidence been filed and, if not, how will the evidence be gathered;
8. what orders was your client seeking and should there be any variation to those orders sought;

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<sup>39</sup> *Re Lack* [1981] Qld 112.

<sup>40</sup> *Dobell v Van Damme* [1982] VicRp 41; [1982] VR 425

9. is an application for family provision available and should it also be made.

If proceedings have not been commenced in the Family Courts, and depending on the state in which your (surviving) client resides, is there an entitlement to make a family provision claim?

If proceedings have not been commenced, and your client is now the deceased spouse, there are no options available to his or her estate. Proceedings cannot be commenced in the Family Court, and there is probably no claim against the surviving spouse that can be brought elsewhere (although there can be a severance of a joint tenancy by course of dealing).

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As to my old client, his adult son was substituted for his mother, and the matter settled. But what if he had not severed the joint tenancy? Would the wife have filed? If he had not and she had not filed, he would have retained the former matrimonial home by virtue of his joint tenancy.

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**July 2018**