

PROPERTY

When s 79 orders are made when the Family Court is unaware of the death of one of the parties

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## **When s 79 orders are made when the Family Court is unaware of the death of one of the parties**

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What happens if a court makes a property settlement order under s 79 *Family Law Act 1975 (Cth)* ("the Act") after a party dies, without the court having knowledge of the death? This was the dilemma faced by the Family Court of Western Australia in *Mooney & Mooney*<sup>1</sup>, where the court had made an order dismissing the s 79 proceedings. The case also raised some of the more general issues faced by a court when a party dies whilst s 79 proceedings are on foot.

### **Background**

In *Mooney & Mooney*, the husband and the wife separated in March 2004. In August 2006, the husband filed proceedings in the Family Court of Western Australia in relation to parenting and financial matters.

The wife was diagnosed with ovarian cancer in late 2008. In November 2010, the parenting proceedings were dismissed by consent. The property settlement proceedings were not pursued by the parties with any vigour following the wife's diagnosis. The wife underwent several years of treatment. In April 2014, the husband received a letter from the court advising that the proceedings would be dismissed unless a written request was received to re-list the proceedings before 9 July 2014, or proposed consent orders were filed. There was a dispute as to whether the wife knew of the letter.

The wife died on 30 June 2014, 9 days before the expiration of the time limit imposed by the court. The court was not advised of her death. On 11 July 2014 the s 79 proceedings were dismissed by the court. On 5 August 2014, the husband wrote to the court advising of the wife's death and that the divorce application would not proceed.

The parties' four daughters (who were executors of the wife's estate) sought to set aside the orders dismissing the proceedings and that they be substituted for the wife as a party to the proceedings.

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<sup>1</sup> [2015] FCWA 84

## The issues

The applicants asked the court to consider the following issues:

- whether there had been a miscarriage of justice by reason of "any other circumstance", which would enable the order dismissing the proceedings to be set aside pursuant to s 79A(1)(a) of the Act;
- if there had been a miscarriage of justice, by reason of "any other circumstance", whether the orders dismissing the proceedings should be set aside; and
- whether, pursuant to s 79(8)(a) of the Act, the executors of the late wife's estate should be substituted for the deceased wife as a party to these proceedings.

## Effect of death on the proceedings

The death of the wife occurred after the finalisation letter had been sent to the parties by the court, but before the time limit for them to take further action had expired.

Section 79(8)(a) of the Act provides that upon the death of a spouse who is a party to property settlement proceedings:

"the proceedings may be continued by or against ... 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"

Rule 6.15 of the *Family Law Rules 2004 (Cth)* ("the Rules") deals with the progress of a property case after the death of a party. The other party or the legal personal representative must ask the court for procedural orders in relation to the future conduct of the case after the death of a party. The court may order that the deceased's legal personal representative be substituted for the deceased person as a party to the proceedings.

Crisford J said that the property settlement proceedings were "suspended" when the wife died until steps are taken under r 6.15 and s 79(8). He said:

"Proceedings for property settlement under s 79 of the Act are based upon a claim which is purely personal. This being the case, the claim abates on the death of one of the parties to the proceedings. Until a legal personal representative is appointed, and substituted for the deceased party, the wording of s 79(8) lends itself to the position that the proceedings are suspended and no further legally effective steps can be taken to either continue or discontinue them" <sup>2</sup>

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<sup>2</sup> at para 25

Crisford J concluded that the proceedings had abated upon the death of the wife and the orders dismissing the proceedings made on 11 July 2014 had no legal effect.

### **Effect of order dismissing proceedings**

The Family Court of Western Australia is a court of record, but unlike the Family Court of Australia it is an inferior court not a superior court. In *Teo & Guan* (2015) FLC 93-653, the Full Court addressed the difference between superior and inferior courts in the context of the possession of inherent or implied powers. The Full Court found (at 81) that in:

"Construing the subject matter, scope and purpose of the State and federal Acts, we find a clear intention that a State Family Court should have precisely the same powers in the exercise of federal jurisdiction as the Family Court of Australia ...".

The Full Court made it clear that the only difference between superior and inferior courts relevant to their decision related to the possession of powers. However, in *Mooney* the validity of the orders was relevant. In that respect, Crisford J said there was a difference between a superior and an inferior court. In contrast with a superior court of record, there was no presumption that the orders made by a court of record were valid and binding until set aside.<sup>3</sup> As the orders of 11 July 2014 were made by a court of record exceeding its jurisdiction, Crisford J found that the orders were a nullity. There was no need to set aside the order of 11 July 2014, as it was void.

Although not dealt with in *Mooney*, an order made in a similar situation by the Family Court of Australia probably would have been voidable, i.e. valid until set aside.<sup>4</sup>

### **Had there been a miscarriage of justice?**

The estate's alternative claim was under s 79A(1)(a). Crisford J found that the applicants, who were the wife's legal personal representatives and the beneficiaries under her will, were "persons affected" by the order of 11 July 2014 and therefore able to apply under s 79A to set the s 79 order aside.

In mid May 2014, the wife signed her last Will and Testament, a Transfer of Land to sever the joint tenancy of the former matrimonial home, and other documents. The wife was to speak to the husband and ask him to sign the Transfer. The husband denied that she did so.

Whether the wife had any notice, or any adequate notice, of the letter from the Court was relevant to whether there had been a miscarriage of justice under s 79A(1)(a) by reason of "any

<sup>3</sup> *Wade-Ferrell & Wade-Ferrell* (2001) FLC 93-069 at 31; *Somerton & Wells (Deceased) and Anor* (2015) FLC 93-631

<sup>4</sup> *DMW v CGW* (1982) FLC 91-274, but also see the discussion of the issue in *Residual Assco Group v Spalvins* [2000] HCA 33

other circumstance". Crisford J found that, through a combination of the wife's lawyers failing to file a Notice of Ceasing to Act, the wife failing to file a Notice of Address for Service and administrative errors, the wife did not receive the letter. The husband said he read the letter from the Court to the wife and she was relieved that the proceedings would be over. Crisford J said that even if he accepted the husband's evidence:

"... this is a far cry from agreeing to the husband retaining all the matrimonial property. It is ambiguous about her intent, especially when a few days earlier she had instructed solicitors to prepare a transfer of land form and to redo her will. It does not suggest the wife intended the husband to take all the property but rather that she was simply relieved that the court with its emotionally draining processes would no longer be involved"<sup>5</sup>

Crisford J found that there had been a miscarriage of justice for "any other circumstance".

### **Outcome**

The Court made orders substituting the wife's four daughters as a party to the proceedings and made procedural orders for the matter to proceed to a conciliation conference.

The result in *Mooney* demonstrates the effect of death on orders made under s 79 when the court is unaware of the death, or for other reasons the s 79(8) procedure is not followed. Orders made by the Family Court of Western Australia will be void, unlike orders made by the Family Court of Australia which are voidable. Depending on the facts, an alternative argument under s 79A(1)(a) may also succeed by reason of a miscarriage of justice from "any other circumstance".

The case is also a useful reminder that upon the death of a party to property settlement proceedings, the progress of the case is "suspended" or abated until steps are taken under r 6.15 *Family Law Rules* and s 79(8) *Family Law Act*.

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<sup>5</sup> at para 63