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Divorce, death and ageing—what happens when one spouse dies?

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DIVORCE, DEATH & AGEING - WHAT HAPPENS WHEN ONE SPOUSE DIES?

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This paper deals with:

1. The effect of death (and imminent death) and ageing on the property aspects of matrimonial and de facto relationship breakdown under the *Family Law Act*; and

2. The law relating to the care of children when one parent dies.

Death of a party before property proceedings are issued

Section 79 proceedings for a property settlement can only be commenced when both parties to the marriage are alive. The Full Court of the Family Court established this principle in the case of *In the marriage of Sims* (1981) FLC 91-072. The Full Court, comprising of Evatt C.J., Emery S.J. and Strauss J, found that:

> *"The structure and the terms of the Family Law Act 1975 do not contemplate the continuance or institution of property proceedings after the death of one or both of the parties."*

and

> *"…when the definition of ``matrimonial cause" in cl. (ca) of sec. 4 speaks of ``proceedings between the parties to a marriage with respect to the property of the parties to the marriage or of either of them...", it refers to proceedings between two living persons who either are parties to an*

existing marriage, or who were parties to a marriage which has been dissolved."

In 1983 section 79 was amended by the insertion of section 79(8) to specifically provide for the continuation of property proceedings after the death of one of the parties. However the rule that section 79 proceedings are a personal right that cannot be commenced after the death of one of the parties remains.

Continuation of property proceedings after the death of one party

Section 79(8) provides that:

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.*

Similar provisions apply to section 79A proceedings to set aside property settlement orders, de facto property proceedings, proceedings to set aside de facto property settlement orders and proceedings to set aside Financial Agreements which are on foot when a party dies (sections 79A(1C), 90SM(8), 90SN(5), 90K(5), 90UM(8).

It is important to note that for section 79(8) to be activated, it is only necessary for the section 79 proceedings to have been filed, not necessarily served (see *Mason and Hannaford, Mason-King (Intervener)* (1994)FLC 92-446).

Procedural issues

Until the legal personal representative of the deceased party is substituted as a party to the proceedings, the section 79 proceedings are effectively suspended.

Rule 6.15 of the *Family Law Rules* sets out the procedure for substituting the legal personal representative in the Family Court.

> *6.15(1) This rule applies to a property case or an application for the enforcement of a financial obligation.*
>
> *6.15(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.*
>
> *6.15(3) The court may order that a person be substituted for the deceased person as a party.*

There is no definition in the *Family Law Rules* of "legal personal representative", but the *Explanatory Guide* (non-binding) to the *Rules* defines the legal personal representative of a deceased person as being *"the executor or administrator of the party's estate"*.

The *Act* and *Rules* could create an absurd situation in a case where the surviving spouse is the executor of the deceased party's estate. In that situation the same person could act as both applicant and respondent in the one case. This is a good reason to advise clients to change their Will upon separation, if only at the least to ensure that the executor of their estate is a person that they would feel comfortable with continuing any property settlement proceedings on their behalf in the event of their untimely death.

The effect of the suspension of the proceedings pursuant to Rule 6.15 means that 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. In *Strelys and Strelys: Lukaitis (Executor)* (1988) FLC 91-961 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. After the husband's death, the wife filed a notice withdrawing her application for a property settlement. That left no 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.

Death of both parties

The operation of section 79(8) was considered by Justice Le Poer Trench in *Estate of MacKenzie (deceased) & Estate of MacKenzie (deceased) & Anor* [2007] FamCA 882. The question for determination was whether section 79(8) could be relied upon to allow the property proceedings to continue in circumstances where both parties had died.

The parties were married in 1959 and, according to the wife, separated in the 1980s. There were no children of the marriage. In May 2003, a Public Guardian was appointed to manage the wife's affairs. In early July 2003, the husband executed a Will which bequeathed his entire estate to the wife. Less than two weeks later, the husband commenced property proceedings in the Family Court.

The husband's application sought orders for the sale of a property in Sydney, which was registered in the wife's name, and a division of the proceeds of sale 80/20 in his favour. The Public Guardian filed a response on the wife's behalf and sought an order for the sale of the Sydney property, with the wife to receive 100% of the proceeds of sale.

The husband died in June 2004. His estate was valued at $11,000. In December 2004, the executor of the husband's will, Mr Kowal, was appointed as the husband's legal representative for the property proceedings.

The Sydney property was sold in late 2004 for $305,000. After the payment of monies to the wife's care facility and to the Office of the Protective Commissioner, the balance of the proceeds of sale was then deposited into a bank account in the wife's name.

In May 2005, Ms Charles was given leave to intervene in the property proceedings. She alleged that she was in a de facto relationship with the husband from 1995 until his death in 2004. Leave was granted on the basis that Ms Charles had a vested interest in the outcome of the proceedings as she wanted to protect her potential entitlement under the *Family Provision Act*.

The wife died in January 2006. Her niece, Ms Mathews, was granted Letters of Administration in October 2006 and acted as the wife's legal personal representative in the property proceedings. The wife's estate was valued at $290,794.

The husband's legal representative then filed an application which sought a declaration that he could continue the property proceedings as both parties had died.

As a preliminary observation about section 79(8), His Honour stated that:

> *"…there can be … no argument that if both parties to a marriage are deceased proceedings for alteration of property interests under section 79 of the Act cannot be instituted/commenced in the Court. The same is true in circumstances where one of the parties to a marriage has died. Thus it must be seen that section 79(8) provides an exception to the general principal that under the Family Law Act property adjustment does not occur where one or more of the parties to the particular marriage have died."*

His Honour then examined the original wording of section 79(8) as well as the subsequent amendments to it.

The husband and intervener essentially submitted that section 79(8) can be invoked where one or both of the parties to the marriage die. The wife contended that section 79(8) only applied where one of the parties to the marriage had died and that the Court's jurisdiction ended upon the death of both parties to the marriage.

After examining various authorities and extrinsic material, His Honour found that section 79(8) does not apply in circumstances where both parties to the marriage have died. His Honour concluded:

> *"I conclude that the Court does not have jurisdiction to continue to hear the husband's application or the wife's response. The death of both parties brings to an end the jurisdiction of the Court. The existence of section 79(8) provides for an exception to the general rule that property proceedings cannot be commenced where one of the parties has died. It*

> *appears to me the Legislation contemplates that in such circumstances the remaining party to the marriage would have a remedy elsewhere."*

In the case of *Whitehouse & Whitehouse* [2009] FamCA 68, Mushin J considered the Court's power to make orders for a declaration of trust pursuant to the Court's accrued jurisdiction in circumstances where both parties died during the proceedings.

The parties married in 1979 when aged in their late 50s. It was a second marriage for both parties and each had adult children from previous marriages. In October 2006, the wife was admitted to hospital. Upon her discharge, she went to live at her daughter's home. The wife's daughter subsequently filed an application for a section 79 property settlement on behalf of her mother and applied to become her mother's Case Guardian. The daughter alleged that the parties were separated.

Orders were made in December 2006 appointing the wife's daughter as her Case Guardian and the husband's son as his Case Guardian.

The husband's Case Guardian filed a Response which sought a division of property in the husband's favour. Four months later in May 2007, the husband's Case Guardian filed an Application in a Case which sought, inter alia, an order that the Court to declare that the parties were not separated and that the marriage had not irretrievably broken down. The Response thus challenged the Court's jurisdiction to hear the substantive applications.

The husband died later that month.

The wife's Case Guardian then filed an Amended Application for Final Orders which sought that the Court either make an order for the division of property pursuant to section 79 or, pursuant to its accrued jurisdiction and at equity, declare that the husband and his successors in title hold his/their interest in the property pursuant to an implied constructive or resulting trust on behalf of the wife

At the hearing, Senior Counsel for the husband submitted that the Court did not have jurisdiction to consider the wife's amended application because it was not open to either party to raise the trust issues unless the application was made pursuant to section 78, which gives the Court power to make declarations of interests in property.

Senior Counsel for the wife submitted that the Court had jurisdiction to determine the trust issues pursuant to its accrued jurisdiction and further submitted that once the Court became seized of a State matter, it must hear and determine it.

It was common ground between the parties that the section 79 applications and the Court's power to determine them ended upon the wife's death. Both parties additionally agreed that the Court did not have original jurisdiction to deal with a stand alone matter "at equity".

Justice Mushin accepted the husband's submissions and held that the relief sought by the wife could only have been sought pursuant to section 78. As her Amended Application was not made pursuant to this section, it was held to be void *ab initio* for want of jurisdiction and dismissed.

The wife's Case Guardian appealed. The gravamen of the appeal was that there was a federal claim properly before the Court (that is the section 79 application) at the time the accrued jurisdiction application was made. It was submitted by the wife's Case Guardian that the accrued jurisdiction issues could still be determined after the wife's death because they now formed part of the Court's federal jurisdiction and were not affected by outcome of the original section 79 claim.

The husband's Case Guardian contended that if the Court had accrued jurisdiction to declare the existence of a trust, then such jurisdiction was extinguished when the Court's jurisdiction under section 79 ended. That is, there could be no accrued jurisdiction if the Court's federal jurisdiction was no longer invoked.

The Full Court (May, O'Ryan and Stevenson JJ) dismissed the wife's appeal but for different reasons than those of the trial judge (*Whitehouse & Whitehouse* [2009] FamCAFC 207).

Their Honours considered the decision of the Full Court of the Federal Court in *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 128 FCR 507 and quoted the following passages (citations omitted):

> *… the mere fact that the federal claim was unsuccessful did not mean that the Court could not determine the non-federal claim. Since the Court did have jurisdiction to determine the federal matter arising before it, that jurisdiction did not cease once the federal claim was determined adversely to the applicants*.
>
> *What is, we think clear, however, is that where the federal part of the controversy is such that the Court lacks jurisdiction to hear it, then there can be no accrued jurisdiction. Accrued jurisdiction can only arise where the single controversy which is the 'matter' is one which is within the jurisdiction conferred upon the Court. If no federal jurisdiction is properly invoked then there can be no accrued jurisdiction.*

The Full Court accepted the submissions made on behalf of the husband that once the federal jurisdiction was no longer properly invoked (as the section 79 proceedings had ended) the Court did not have any accrued jurisdiction remaining before it. Their Honours said:

> *We are of the view that when the matter came before Mushin J for determination, as both parties were deceased, there was no dispute remaining between them about which the Family Court had federal jurisdiction. Therefore no application relying on accrued jurisdiction could attach to a Family Court matter.*

However, the Full Court departed from the trial judge's reasons in relation to section 78. Their Honours expressed doubt that section 78 proceedings could be continued by way of section 79(8) after the death of a party.

Section 79(8)(b)

Once the legal personal representative of the deceased party has been substituted into the proceedings, the Court can make an order with respect to the property of the parties provided that it is of the opinion:

1. That it would have made an order with respect to property if the deceased party had not died; and

2. That it is still appropriate to make an order with respect to property.

Thus Section 79(8)(b) provides for a two step test before the Court can make a property order.

The property pool

There are three different references to property within section 79(8). In the two steps of the test to determine whether or not the Court can make a property settlement order, Section 79(8)(b)(i) and (ii) refers simply to "property". Later, Section 79(8)(b)(iii) refers to the court making orders with respect to the "property of the parties to the marriage or either of them". Section 79(8)(c) refers to any order being made pursuant to sub-section (b) as being capable of being enforced against "the estate of the deceased party".

The distinction between "property" and "property of the parties to the marriage or either of them" within section 79(8)(b) is an important one. In coming to an opinion as to whether or not the court can make an order, the court only has to determine that it would have made an order with respect to property prior to the deceased's death and that it is still appropriate to make an order with respect to property. That property does not necessarily have to be property of the parties to the marriage. Thus, for instance, it could include the court considering that it

would have made an order pursuant to the third party provisions against property owned by a third party.

The property of the parties to the marriage may change significantly as a result of the death of one of them.

Whilst slightly outdated as to subject matter, the case of *Evans & Public Trustee for the State of West Australia as legal personal representative of Evans* (1991) FLC 92-223 dealt with the vesting of a party's superannuation entitlements upon death. The case was decided before the superannuation splitting regime came into place and at a time when there was still jurisprudential argument about whether or not superannuation entitlements could strictly be deemed to be "property". In that case the husband died during the course of the proceedings and upon his death his superannuation entitlements crystallized and were payable to his estate. His legal personal representative argued that section 79(8) meant that the court could not make an order with respect to assets which accrued to the estate which had not previously constituted property of the deceased when he was alive. The Full Court held that the property of the deceased within section 79(8) refers to the property in that person's estate, whether or not it became vested before or as a consequence of that death.

The case poses some interesting questions now that superannuation is dealt with in a different way under the *Act*. Presumably the Full Court's interpretation in *Evans* means that if the deceased party has signed a binding death nomination with the effect that a third party receives the superannuation entitlements upon his or her death, the fact that the superannuation entitlements were property of the deceased before his or her death, those entitlements would continue to be considered property of the parties to the marriage after death for the purposes of Section 79(8). However, what about life insurance? Does it matter that the entitlement does not form part of the deceased's "estate", but is directly payable to a third party?

The issue is still largely unresolved. There is an unreported decision of SJZ and others and FHN [2005] FamCA 756 dealing with property which was held by a trust.

In that case the husband conducted a business and held assets through a number of entities. He had 4 adult children from his first marriage. Some of them were involved in those entities. The husband was diagnosed with cancer and shortly thereafter the wife told him that the marriage was at an end. After his condition was declared terminal, the husband entered into a series of transactions including binding death nominations in relation to his self-managed superannuation fund and amendments to a family trust and other companies. Those steps arguably meant that after the husband's death, the husband's estate had no interest in those trust assets. The wife's application to set aside those transactions pursuant to Section 106B was not determined before the husband's death (and it is unclear from the judgment if in fact the application was even made before the husband's death).

Thus there was an argument about whether, for the purposes of Section 79(8)(b) the expression "the property of the parties to the marriage" included the totality of the property that was, or would be deemed to have been, the property of the husband before his death. The question is one of timing. Is the "property of the parties to the marriage" to be determined according to what is in existence before death or after death…or a bit of both? Ultimately the Full Court in *SJZ* did not need to decide the issue because the appeal was determined on other grounds, and thus it remains unresolved.

Section 79(8)(b)(ii)

The second step of the test is whether the Court is of the opinion that it is still appropriate to make an order with respect to property after the deceased party's death. In some instances the financial circumstances of the surviving spouse may improve as a result of the other party's death, making it no longer appropriate to make a property settlement order.

This was considered in the case of the *Tasmanian Trustees Ltd (as administrators of the estate of Gleeson) and Gleeson* (1990) 14 Fam LR 189.

The parties' only significant asset was a house, which at the time of the trial was valued at $60,500. The parties had been separated for about 8 years before the husband filed an application for a property settlement. He sought a settlement in his favour of 70% of the net value of the property. Most of his claim was justified on the basis of his needs arising from the chronic degenerative neurological condition from which he suffered. The wife made significant post-separation contributions to the property. At the time of the trial, she was an invalid pensioner. The matter proceeded to trial. The husband was still alive. Two days before judgment was delivered the husband died and thereafter his executor was substituted as the party to the proceedings.

The property proceedings continued and a new judgment was delivered. The trial Judge found that had the husband been alive, he would have made an order for a property settlement. The question then was whether it was still appropriate to make an order. The trial Judge found that it was not appropriate. The wife had inherited the entire home by right of survivorship. The effect of the trial Judge's order was that she retained the property outright and the estate received nothing. That decision was upheld on appeal by the Full Court comprising Justices Strauss, Baker and Nygh. The Full Court found:

> "*… it would be rare for a Court to deprive one of the spouses of the marriage of the entire share to which he or she might be entitled by reason of contribution, having regard to the needs of the other party. But… whilst it might be rare, it does occur and the obvious example is a situation where the estate is very small, consisting of a modest former matrimonial home, where one spouse has no earning capacity and the other spouse is unwilling or unable to contribute to the support and maintenance of the spouse in possession of the house and any dependents."*

Section 79(8)(b)(ii) and (iii) - needs factors and the relevance of beneficiaries

Section 79(8)(b)(ii) provides that the court must consider, after the death of one of the parties, whether it is "still" appropriate to make a property settlement order. *In the marriage of Doyle and Doyle (deceased)* (1989) FLC 92-027, Justice Lindenmayer considered whether the word "still" meant the factors to be taken into account in exercising the section 79 discretion to make a property settlement order were different after the death of one of the parties. He held:

> *"I turn, then, to consider the question posed by sec. 79(8)(b)(ii), namely whether I consider it ``still appropriate to make an order with respect to property'' notwithstanding the changed circumstances flowing from the wife's death, and if so what order is ``appropriate'' in these circumstances.*
>
> *The Act itself gives no clear guidance as to how the Court should determine this question. It apparently leaves the matter entirely to the discretion of the Court. The criteria for the exercise of that discretion, namely that it is ``appropriate'', is the same as that for the exercise of the discretion, under sec. 79(1), to make an order between living spouses or former spouses. Furthermore, sec. 79(2), which provides that the Court shall not make an order ``under this section'' unless it is satisfied that it is ``just and equitable'' to make the order, also applies, since sec. 79(8) is part of ``this section''. Likewise, it would seem that sec. 79(4), which provides that in considering what order (if any) should be made ``under this section'', the Court shall take into account the various matters referred to in para. (a) to (f) thereof inclusive, must also apply. However, as some of those matters, particularly many of the matters referred to in sec. 75(2) which are brought into account by sec. 79(4)(e), are apt to refer only to parties who are living, it is very difficult to apply them in a case where one of the parties is dead. This much is therefore clear, that the intention of the*

> *legislature was that the discretion of the Court under sec. 79(8) should be no more fettered than its discretion under sec. 79(1)…"*

In *Doyle* Justice Lindenmayer took into account the fact that the husband had a future need to support himself and at least some of the children of the marriage, and that the wife no longer had any future needs. However he also stated"

> *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.*

The leading case in relation to the relevance of beneficiaries' entitlements under the Will of a deceased party is *Menzies & Evans & Another* (1988) 12 Fam LR 519. In that case the parties had been married for almost 50 years when they "separated". Indeed whether or not the parties were separated of their own free will seems dubious. Both parties were ill. The husband suffered a fall and the wife was not capable of looking after him adequately. One of the parties' daughters took in the husband, and the wife complained that she was thereafter denied "access" to the husband.

In any event, the husband brought the property settlement application, seeking a 50/50 division of the parties' assets. The wife died before the application could be finally determined. The main asset of the parties was the former matrimonial home, which had been registered in the sole name of the husband. The beneficiaries of the wife's estate were her granddaughter and grandson. The granddaughter and her husband were the executors of the wife's estate, and were substituted as parties to the proceedings. Without a section 79 order, the wife's estate comprised of very minimal assets.

After the wife's death, the husband amended his property application to seek 80% of the pool. The husband argued that where a section 79 claim is continued

on behalf of the deceased spouse, the children of the marriage must stand to benefit from the outcome for the claim to be successful (remembering in this case the wife left nothing to her children in her Will). In doing so, he relied on a remark by Justice Brennan of the High Court in *The Marriage of Fisher* (1986) FLC 91-767 that *"section 79(1) provided for the property of the parties to be available to answer the moral claims of either spouse or the children of the marriage against the spouse who is entitled to the property".*

It was agreed at trial that, but for the wife's death, the most likely outcome was a division of the assets on an equal basis. The wife's legal personal representative argued that should be the result, notwithstanding the wife's death.

Justice Smithers, at trial, found that Justice Brennan's remarks were directed at the situation where the claim is against the deceased spouse (i.e. the deceased spouse owned all the property), and not against the surviving spouse. He found that:

> *"The contributions of a spouse are not set at nought, simply because, when he or she dies, the assets are left to grandchildren or strangers rather than to children."*

This accords with the joint judgment of Justices Mason and Deane in *Fisher* that:

> *"It is…immaterial that a person other than a party to the marriage may benefit from an order made in proceedings commenced by a party to a marriage who dies before completion of the proceedings."*

However, Justice Smithers also found conversely that it was not appropriate for the Court to consider *"any suggested merits of the persons who benefit under the will"*.

Those comments were approved of by the Full Court in *Tasmanian Trustees* (supra). Justice Nygh stated:

> *" I wholeheartedly agree with the learned trial judge in that case that the deceased has a prima facie moral entitlement to the share gained by contribution during his or her lifetime and, if this is so desired, to dispose of that share by will to persons who are strangers to the marriage."*

In the result, Justice Smithers in *Menzies* gave the wife's estate about 48% of the asset pool. Whilst he acknowledged that the deceased no longer had section 75(2) needs, the husband's needs were largely able to be met out of his income and the extent of his future needs were not significant in light of his age (85 years).

Imminent death of a party

Whilst it seems to be accepted that the section 75(2) factors are irrelevant to the assessment of the claim of a party who has died, an interesting issue arises as to the weight to be given to those factors in favour of a party who is near death.

The leading case in this area is the Full Court's decision in *In the marriage of Lawrie* (1981) 7 Fam LR 560. In that case the parties had been married for 27 years, and separated for 10 years. At the time of separation, the wife moved out of the matrimonial home. The husband was ordered to pay interim spousal maintenance, and continued to pay that maintenance (at the same rate) for the following 10 years. The wife then filed an application for a property settlement, and for an order increasing the maintenance.

Both parties were aged 60 at the time of the trial. The wife was living in a basic Housing Commission flat, she had no assets, her only source of income (other than the modest spousal maintenance) was the pension and she suffered from arthritis and depression. The husband had the house, car, a modest yacht and some cash. He was the owner of a business which generated income for him. The husband was also suffering from terminal cancer and his life expectancy was estimated at 5 or 6 months.

The trial judge, Justice Emery made orders giving the wife 65% of the net proceeds of sale of the home, an increased maintenance order until the time of settlement of the sale, but also a restriction that the property could not be sold until after the husband's death. The husband appealed (he having survived to the time of the appeal). He argued that the pool should have been divided 50/50.

The majority of Justices Fogarty and Gee dismissed the appeal, finding that the unique circumstances of the case, including the future needs of both parties, were such that the trial judge's orders achieved a just and equitable result. The majority held:

> *"…where in any case it is clearly established that the future financial needs of a party will terminate (or perhaps significantly diminish) upon the happening of a definite future event, it is proper to take that into account…"*

Justice Asche dissented. He argued:

> *"His Honour at p 18 makes this comment: "If in this case the husband was fortunate enough to suffer from acute arthritis only which prevented him from working, then it would be almost inevitable that such assets as the parties now have would come very close to being evenly divided on the facts as I have found them to be."*
>
> *I find it difficult to understand why, if that is so, the fact that the husband may die within an early date makes any difference. One postulates an on-going condition of illness; the other a short period of illness followed by death. I repeat that the court is bound to do that which is just and equitable to both parties, and in the circumstances which his Honour has found, which called for an equality of contribution, it is not just and equitable that the husband should be deprived of some part of what would otherwise be his equal share on the basis that he has a short life expectancy. It is not just and equitable to him, it is not just and equitable*

> *to his desire and capacity to deal with his estate as he wishes; and although I concede that I am stating this in an extreme way, it might well seem to him as if he were being punished for his illness."*

In the case of *Van Ballekom & Kelly* (2005) 34 Fam LR 1 at trial, a wife who was suffering from terminal cancer received a 5% section 75(2) factors adjustment in her favour. The wife was caring for the 2 children of the relationship at the time of trial. Her doctor gave evidence that she had a mean life expectancy of 12 months. The trial judge found that the differences in the parties' incomes warranted a 5% adjustment in the wife's favour *"on the basis that to assume her decease within 12 months could well result in a very significant injustice to her".*

The husband appealed. By the time of the hearing of the appeal the wife had died and the two children were living with him. Evidence of the wife's death was admitted as fresh evidence. The Full Court held that in light of the wife's death, a section 75(2) adjustment in her favour could no longer be sustained and that a section 75(2) adjustment should instead be made in favour of the husband given his ongoing care of the children.

More recently, in the case of *Konitza,* the trial judge had to assess the future needs of the husband who was aged in his 90s at the date of the trial. The trial judge did not make an adjustment for his future needs and said *"where one party is deceased, it is generally accepted that s 75(2) adjustments may be made only for the surviving party….having regard…to the husband's age, living circumstances and the background to those, no adjustments for s 75(2) factors are appropriate in favour of either party…."* The trial judge's assessment of section 75(2) factors was not challenged on appeal.

It is interesting to mention the unusual fact scenario in this case as set out in the Full Court's judgment, *Konitza & Konitza* [2009] FamCAFC 171.

The husband was born in Albania in 1910 and was aged 99 at the date of appeal. The wife was born in Albania in 1918 and died at the age of 89 in early 2008. There were three children of the marriage.

The wife instituted property proceedings in June 2006 but died before the proceedings were heard in May 2008. The wife was subsequently legally represented by the parties' grandson.

The parties lived together from 1934 until 1946 when the husband fled Albania. From 1946 until 1990, the wife lived in prisons, labor camps and institutions controlled by the communist government which ruled Albania. The wife's internment was a direct result of the husband fleeing the country. In effect, the wife served the husband's sentence for him being a traitor to the state. She cared for their three children without any support or contact from the husband. The husband lived in Australia from 1948. The parties did not live together again until 1993. This period of cohabitation lasted about one year and they divorced in about 2006.

The trial judge divided the asset pool as to two thirds to the husband and one third to the wife.

The asset pool included the net proceeds of sale of farming land in the sum of $3,000,000, some of which had been gifted to family members. The trial judge declined to notionally add back a transfer of land by the husband to their grandson valued at approximately $260,000. However, the sum of $499,700 was notionally added back representing a gift of money by the husband to his daughter after the property proceedings had commenced.

The trial judge found that the wife had made no direct or indirect financial or non-financial contribution to the husband's assets. The husband's financial contributions were thus assessed at 100%. Her Honour found that the husband's post 1994 contributions "roughly doubled" the asset pool. However, the wife had made 100% of the contributions as a parent.

On appeal, the wife argued that the trial judge undervalued the asset pool, provided inadequate reasons for judgment and improperly exercised her discretion. The husband cross-appealed. He contended that the trial judge had erred by double counting property and making an excessive division of property in the wife's favour. The wife sought 50% of the adjusted net asset pool on appeal. The husband, on a differently adjusted asset pool, sought 90% of the asset pool.

The Full Court upheld part of both the wife's appeal and the husband's cross-appeal. Their Honours held that the asset pool was overvalued by the trial judge in the sum of $273,492.60 and that she had erroneously failed to take into account the wife's indirect contributions to the property, particularly post 1994. That is, the wife had made indirect contributions by not making a claim for a property settlement against the husband until 2006. The husband was thus able to retain and utilise all the assets until 2006. However, the Full Court upheld the trial judge's decision in relation the notional add backs and found that the reasons for judgment were not inadequate.

In *Konitza & Konitza (No. 2)* [2010] FamCAFC 213, the Full Court re-exercised the trial judge's discretion and made orders for the husband to pay to the wife's legal representatives a sum of money to adjust the division of property so that the wife received 50% of the asset pool.

Beneficiaries are irrelevant…or are they?

The decision of Justice Young in *Leggero and Jagger* (2007) 38 Fam LR 561 casts new light on the authority of *Lawrie.* Whilst the Judge was bound by the earlier Full Court decision, he expressed considerable sympathy for the dissenting judgment of Asche J in that case and found that it was time for the Full Court to re-assess the principle in light of subsequent amendments to section 75(2).

The parties in *Leggero* were in a relationship for 10 years. It was the third marriage for each of them and both had children from their previous relationships. There were no children of this marriage. The total pool of assets was $1.8 million. At the time of the trial the husband was suffering from advanced, terminal cancer and had a life expectancy of some 3-4 months. The husband was 65 years of age, and the wife was 50 years of age.

On contributions, the Judge divided the property with a 6% adjustment in the wife's favour. When it came to an assessment of future needs, he said of the decision in *Lawrie*:

> *I am of the opinion that Asche J's rationale, but not his analogy to punishment, bears considerable force. In my view, it does present a difficulty for it to be said to be just and equitable within the focus of the Act as it is now drafted for a party to receive an additional loading based not on some specific need of their own, but rather on the diminished need of another. To award one party an adjustment to which they would not be entitled were the other not terminally ill is, in effect, to allow the surviving party to profit from the other's tragic circumstance."*

Justice Young pointed out that when *Lawrie* was decided, section 75(2)(d) was drafted differently. At that time it provided:

> *(d) the financial needs and obligations of each of the parties*

The section was amended in 1987 to now provide:

> *(d) commitments of each of the parties that are necessary to enable the party to support:*
>
> *(i) himself or herself; and*
>
> *(ii) a child or another person that the party has a duty to maintain;*

According to Justice Young it is time for the Full Court to reconsider the principle in *Lawrie*:

> *"To my mind, the language in the amended section is much broader than, and of different emphasis, to its predecessor. It omits the much commented on terminology of 'needs' and the stress placed upon financial obligations. The new language explicitly includes commitments to others including children and may perhaps be more accommodating of a party's right to direct their estate as they see fit, their commitments to beneficiaries under a will and of their entitlement to benefit from their assets and financial resources acquired during a marriage."*

In the result, bound by *Lawrie,* Justice Young gave the wife another 6% for needs.

Justice Cohen considered the *Leggero* in *Lawless & Lawless[2011] FAMCA 34.* In that case the husband was suffering from a range of serious medical conditions, including incurable cancer for which he was receiving no treatment apart from palliative chemotherapy. The prognosis of his life expectancy was "months to a year or two". The parties had 4 children, 2 of whom were under the age of 18.

Justice Cohen disagreed with Justice Young interpretation of the effect of the amendments to section 75(2)(d):

> *I appreciate the amendment must have had a purpose, but I do not regard it as having been shown on its face to warrant any greater emphasis on the rights of a party who is unlikely to live long when compared with the life expectancy of the other party to give away his estate or leave it by testamentary disposition to whomsoever he chooses. I cannot distinguish between "financial needs" and "financial obligations' on the one hand and "commitments...necessary…to support himself; and a child or another*

> *person [he] has a duty to maintain". I cannot determine any difference between "obligations" and "commitments'.*

Is separation necessary?

The case of *Jennings* (1997) FLC 92-773 is an interesting illustration of when the Court might decline to exercise its discretion to make a property settlement order.

At the time of the hearing the husband was 73 years of age, had been hospitalised for 3 years and was likely to remain in hospital for the rest of his life. He had suffered dementia and other health problems for 9 years. The wife was 70 years old and lived in a property owned by her since before the marriage. The wife had been able to care for the husband at home until 1994. Between the time of his hospitalisation and the time of the hearing, the wife visited the husband on a regular basis in hospital.

State Trustees had been appointed as administrator of the husband's affairs in late 1994 (at the request of the wife's son from a previous marriage) and State Trustees acted as the husband's next friend in the Family Court proceedings.

State Trustees, as next friend of the husband, issued an application for a property settlement. The wife responded seeking that the application be struck out, or in the alternative, stayed until separation had taken place.

It was conceded by State Trustees that the wife had never formed an intention to separate from the husband and that the husband had never given any instructions to the effect that the marriage was over. State Trustees had reached the decision that the parties were separated.

Justice Dessau found that the powers of the Administrator pursuant to the *Guardianship and Administrative Board Act (Vic)*

> "*preclude a conclusion that the Administrator is able to form the intent to severe the represented persons marriage … It strikes me as a perverse proposition that an Administrator, appointed to represent a person who*

> *through disability is unable to organise his own affairs, could simply 'reach a decision' that the person's marriage has ended … In my view the Administrator is empowered to handle the legal and financial affairs of a party but cannot possibly be empowered to handle 'the affairs of the heart' or the most intimate aspects of the represented persons mind and soul*".

Her Honour concluded that separation had not taken place.

It was conceded by both parties that the jurisdiction to make an order in the case fell within the definition of matrimonial cause in section 4(1)(ca)(i).

It was submitted however on behalf of the wife that although the jurisdiction existed, the Court should not exercise that jurisdiction in the case because:

(a) the Court should seek to protect, rather than promote the downfall of the parties' marriage;

(b) until the parties separated, the Court could not properly consider the respective contributions made by the parties pursuant to section 79, a final property order could not properly or fairly be made given that the marriage was ongoing, and there were limited opportunities for the parties to seek to set aside any property order that could be made.

Her Honour agreed, finding that

> "*orders finally determining the property issues between [the parties] could not be appropriate, fair or just … in circumstances where the parties have informed no intention to separate, one is suffering illness and is hospitalised and the other continues to visit and partake in his care to the extent that she is able*".

Her Honour invited State Trustees to make an application for maintenance instead.

Almost the same fact scenario was considered by another trial judge in the case of *Sterling & Sterling & Protective Commissioner [2000]FAMCA 1150*. That case involved a marriage of 43 years. A physical separation of the husband and wife

was caused by the wife's diagnosis of Alzheimer's disease, and the husband's own ill health preventing him from being able to provide care to the wife in their home. At the time of the trial the wife was residing in a nursing home. Her financial affairs were being managed by the NSW Protective Commissioner. The wife had no knowledge of the proceedings. The husband still visited the wife in the nursing home. The majority of the parties' assets were owned in the name of the husband. The wife had children from her former marriage.

The husband opposed the application for a property settlement, but offered spousal maintenance. There was no evidence that the receipt of a property settlement would improve the level of nursing care that the wife would receive. Contrary to the decision of Dessau J in *Jennings*, the trial judge made orders for a property settlement of 40% of the parties' assets to the wife.

The husband appealed. The majority in the Full Court (Justices Coleman and Carter) dismissed the appeal. In doing so they held that there was no reason for them to interfere with the discretion of the trial judge:

> *Whilst it might be preferable for there to be unanimity and consistency in the determination of applications of this kind, the mere fact that one Judge exercising a discretion has come to a different view to another exercising that discretion on facts which are quite similar, does not, in our view, render either of those Judges in error. In our view, the differing views of Dessau and Moss JJ illustrates precisely the "…generous ambit within which reasonable disagreement is possible".*

Kay J delivered a lengthy dissenting judgment, wherein he disagreed with the trial judge's emphasis on the physical separation of the parties and his finding that "*almost every attribute of a normal married life and a normal married relationship between married persons has ceased to exist".* Kay J held that the Family Law Act does not set down any test of what is "normal married life" and found:

> *The attributes of a "normal married life" can still exist even though the parties are physically separated in circumstances sometimes within their control and sometimes beyond their control.*

Using the example of couples who are separated by work in overseas countries, by jail terms or by immigration restrictions, Kay J said that many of those couples would consider that their marriage is still subsisting.

Kay J referred to the reality that such litigation was often taken in an endeavor to secure an inheritance, rather than to achieve a material benefit for the incapacitated party.

> *It is widely known that as the life expectancy of our community becomes greater, so does the incidence of dementia. The problem which presents itself in this case and in Jennings' case is likely to become more prevalent. When coupled with an increase in the incidence of remarriage and "blended families", the pressures to ensure that each party to the marriage has an estate available to pass on to their descendants grows. The real protagonists in this type of litigation may often not be the parties to the marriage but their heirs and successors. An issue clearly arises as to whether it is appropriate that the Family Law Act be utilized as the means by which the competing claims of the next generation should be aired.*

His Honour considered the relevant sections of the Family Law Act (emphasis added):

1. section 79(1) - In proceedings with respect to the property of the parties to a marriage or either of them, the court **may** make such order as it considers **appropriate** altering the interests of the parties in the property…including an order requiring either or both of the parties to make, **for the benefit** of either or both of the parties…such settlement or transfer of property as the court determines.

2. Section 79(1B) - The court **may adjourn proceedings** with respect to the property of the parties or either of them, **except** where the parties are…{in summary, involved in divorce or nullity proceedings}..on such terms and conditions as it considers appropriate, for such period as it considers necessary **to enable the parties to the proceedings to consider the likely effects (if any) of an order under this section on the marriage**…

3. Section 79(2) - **The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.**

In his Honour's view, the legislation recognises that an order made after separation has different connotations to an order made during the course of a subsisting marriage. He relied further on section 14C of the Act which requires a judge to consider the possibility of a reconciliation between the parties (and the power to adjourn proceedings to allow the parties to consider that possibility) and section 43 which requires the Family Court to have regard to *"the need to preserve and protect the institution of marriage…"*.

> *It seems to me that marriage is not seen to be an institution that is entered into during such time as the health of the parties enables them to live together. The existence of the necessity for the parties to live in separate premises, brought about by the deterioration in the health of one or both of the parties, ought not be seen, of itself, as an appropriate trigger for the persons managing the affairs of one or other of the parties to successfully apply to have an order made under s79. In my view, if a Court is invited to resist the making of such an order, there ought be proper reasons elucidated as to why the court is intending to make an order in circumstances where it will provide no clear benefit to the party in whose name the order is sought.*

Justice Kay highlights the way such cases have been dealt with in USA Courts. Using those American experiences, he compiles a useful list of the matters that

might properly be considered when a court is deciding whether or not the making of an order in these types of circumstances is "appropriate" or "just and equitable":

- *The possibility that the children or other relatives of the respective spouses might try to pursue proceedings out of self-interest to influence their own inheritances, rather than out of consideration for the needs or wishes of the incompetent spouse*

- *That competent spouses can pursue or oppose a proceeding out of a concern for their own self-interest and the financial consequences to themselves rather than a desire to maintain the marriage relationship*

- *That it might be inequitable to vest the competent spouse with absolute, final control over the marriage*

- *The best interests of the incompetent spouse, keeping in mind possible legal obligations of that spouse to the other spouse and potential heirs.*

On a re-exercise of discretion Kay J indicated that he would set aside the trial judgment and instead adjourn the wife's application until further order. He said that the question of what would form the wife's estate if she outlived the husband could be covered by an application to enliven the proceedings after that time.

In 2001 the husband's application for leave to appeal to the High Court was granted, but the case resolved before the hearing of that further appeal. The transcript of the leave application hearing reveals that Hayne J, at least, was concerned about the general principle that might be set by a reading of the majority's reasons in the Full Court:

> *It would be unfortunate if the decision of the Full Court in this case were taken as a establishing some general principle wider than the particular exercise of discretion on a very particular factual base…*

> *…it may be this case will later be thought to take on a life of its own where it is enough to demonstrate physical separation, ergo property division…*

Stanford: The High Court's view

The matter has now been resolved by the High Court's recent decision to grant leave to appeal in the matter of *Stanford & Stanford[2012] FamCAFC 1*, a case dealing with similar factual circumstances to *Jennings* and *Sterling*.

In *Stanford* the husband and the wife were each aged in their 80's. They had been married for almost 40 years. Each of them had children from their former marriages. The major asset of the marriage was the home, which was owned solely in the husband's name.

The litigation was conducted by each party via their case guardians. The litigation was brought by the case guardian for the wife, one of her adult children. The marriage subsisted, but a physical separation had been caused by the wife suffering a stroke and a diagnosis of dementia. She required full time care in a nursing home. The husband also suffered ill health, had a recent period of hospitalisation and was not able to care for the wife himself at their home. The husband visited the wife in her nursing home at least three times each week.

The husband has set aside $40,000 to fund his wife's care. The wife's case guardian sought a sale of the home and 50% of the proceeds of sale. There was some controversy about whether or not funds were needed for the wife's care, and whether or not she would benefit from the order sought. It seems that the wife's family initially thought that money for a bond was required to provide a better level of nursing home care to the wife; but that by the time of the trial the wife's health had deteriorated, she then needed high level nursing home care and a bond was not required for that level of care.

The Magistrate conducted a separate hearing to determine whether the Court had jurisdiction to determine the matter and whether she should exercise her discretion to make an order in circumstances where the parties were not

separated. Having found that the Court did have jurisdiction and that she should exercise that discretion, the Magistrate then heard the property case and ordered in favour of the wife.

The husband appealed, and the Full Court upheld the appeal. The Full Court held that the Magistrate had been in error conducting a preliminary hearing as to jurisdiction and discretion, and agreeing with Kay J in *Sterling* found;

> *The question is not whether the Court will exercise its jurisdiction as some preliminary question, it is a question of whether it is just and equitable to make an order.*

The Full Court found that the Magistrate had a range of alternative orders available to her, including the power to adjourn the proceedings pursuant to sections 79(5) or 80(1); and the power to make interim and maintenance orders.

The Full Court found that the Magistrate *"seems to have been of the view that having determined jurisdiction should be exercised she felt obliged to exercise it. In our view there are many aspects of this application which do not require an immediate order finally altering the interests of the parties in their property and particularly so where it would require the husband to leave his home of 48 years in which he is still residing."*

The Full Court found that the Magistrate did not give adequate reasons as to why she thought the order was just and equitable, and held:

> *As Kay J observed in Sterling the Court will be required to deal with cases such as this with increasing frequency. It is in our view necessary for such applications to be considered fully having regard to the matters in ss 79 and 75(2) and without any predetermination as to whether or not the Court would exercise its discretion at all, for which we think there is no warrant. In our view it is important in addition for it to be clear that there is no requirement that the Court make a final order for property settlement in such cases that would alter the interests of parties in property on a final*

> *basis especially when the marriage itself is not at an end. There are a number of provisions in the Act which we have already referred to which give the Court power to make interim orders, made orders for maintenance and to adjourn proceedings rather than to determine them on a final basis if the justice and equity of the case requires it.*

The Full Court adjourned the proceedings to allow the parties to make submissions about the future conduct of the proceedings. IN the intervening period the wife died, and the wife's daughters were substituted as the respondents to the appeal. The husband agitated for the wife's application to be dismissed or stayed permanently. The wife's daughters sought a fixed sum upon the earlier of the sale of the home or the husband's death.

The Full Court made orders in terms similar to that sought by the wife's daughters. Adopting the High Court's views in *Fisher*:

> *In our view, the many years of marriage and the wife's contributions demand that those moral obligations be discharged by an order for property settlement.*

On 22 June 2012 the High Court granted the husband leave to appeal. The issue for determination is whether the Court has jurisdiction to make a section 79 order in circumstances where a marriage remains on foot, and a constitutional question about the valid construction or otherwise of section 79.

Financial Agreements

As indicated above, a similar provision to section 79(8) applies in relation to proceedings to set aside Financial Agreements (sections 90K(5) and 90UM(8)).

The division of property aspects of a Financial Agreement made during the subsistence of a marriage or during a de facto relationship only comes into force once a separation declaration is made. Pursuant to section 4(1) of the *Act,*

breakdown of a marriage or a de facto relationship does not include breakdown by reason of death.

However a Financial Agreement that is binding on the parties at the time of death continues to be binding and operate in favour of, or against, the legal personal representative of the deceased person.

The relevance of Financial Agreements that are not binding at the date of death - testator family maintenance claims

An interesting issue is the relevance of a Financial Agreement (and the terms of it) in situations where the deceased party does not make adequate provision for the other in their Will, but the relationship is still on foot at the date of death.

The question was directly considered by the Court of Appeal of the Supreme Court of Queensland in the unreported decision of *Hills v Chalk (as executors of the estate of Chalk (deceased))*BC200804698.

Mr Hills and Mrs Chalk married when they were 69 and 64 years of age respectively. Each of them had been married previously and had adult children. They had been married for about 8 years when Mrs Chalk died. During their marriage they had kept the majority of their property separate and they lived together in a house owned by Mrs Chalk.

Before they were married, indeed as a condition to getting married, Mrs Chalk required Mr Hills to enter into a pre nuptial Financial Agreement with her. The terms of the Agreement provided that in the event of their separation they were each to retain their own assets and make no claim for property settlement or maintenance from the other. The recitals to the agreement recorded their joint intention to preserve their assets for their respective families. It included a provision:

> *Both Marie and Garnet propose to make Wills before their marriage. Although Marie has made provision for Garnet in her will on certain terms*

> *and conditions, it is the intention of Marie and Garnet to provide for their families. It is therefore the intention of Marie that her children and grandchildren receive the benefit of her estate, both real and personal on her death. . It is the intention of Garnet that his children and grandchildren receive the benefit of his estate, both real and personal on his death. Marie and Garnet wish their intentions to be taken into account if either make an application under state testator's family maintenance legislation.*

In her Will, Mrs Chalk gave Mr Hills the right to live in her home after her death (on certain conditions) and an additional bequest of $20,000. Some 4 years after her death (and out of time) Mr Hills brought an action under the *Succession Act 1981 (Qld)* for maintenance. He was in ill health and could no longer live in the wife's home. He wanted funds from the estate to build a granny flat in the backyard of his daughter's home so that he could live there and be cared for by her.

The assessment of a testator's family maintenance claim is a two step test. The first is a consideration of whether the provision made for the applicant was inadequate for his proper maintenance. The second step is an assessment of what would have been a proper level of maintenance having regard to a number of factors including the applicant's financial position, the characteristics of the estate, the "totality of the relationship between the applicant and the deceased", and the relationship between the deceased and other potential beneficiaries. (*Singer and Berghouse* (1984) 181 CLR 201*)*

In *Barns v Barns* (2003) 214 CLR 169 the High Court confirmed that it was not possible to contract out testator's family maintenance provisions. Thus the question was the relevance of the terms of the Financial Agreement.

The Court of Appeal found that the terms of the Financial Agreement were relevant to an assessment of the totality of the relationship between Mr Hills and Mrs Chalk. As held by Keane JA:

"…the pre-nuptial agreement made by the parties, although not of itself directly decisive against Mr Hills' claim, is of significance to the assessment to be made by the court of Mr Hills' application for further provision from the estate of the Testatrix. The mutually agreed intentions and expectations of the Testatrix and Mr Hills expressed in the pre-nuptial agreement in relation to their adult children, and their acknowledgement that each should not seek to defeat the intentions of the other in that regard, was a consideration which should be regarded by the court as illuminating the totality of their relationship, and as suggesting that the provision made for Mr Hills by the Testatrix was adequate for his proper maintenance and support within the meaning of the Act."