If there has been a divorce then pursuant to s.14 the *Wills Act* the Will is construed as if the surviving spouse had predeceased the deceased. That is to say, that any gift made under the existing Will to the divorced spouse will have lapsed, and any purported appointment of them as executor will be ineffective. Under those circumstances, as with an intestacy discussed above, the person with the greatest interest in the residue of the estate will be preferred as administrator.

If there has been no divorce (and in the case of separated former de facto couples) the Will continues to take full force and effect.

Despite the fact of separation, and the existence of the proceedings for division of matrimonial property, the former partner of the deceased will be entitled to the grant of probate, and to take the benefit under the will (subject to any family provision claims against the estate).

Minor beneficiaries:

Another cause of potential convolution is the situation where, absent an executor, the person with the greatest interest in the estate is a minor (usually a child, or the children, of the deceased). This can occur both on an intestacy, or under a will where the executor does not, or cannot, apply for probate. In this situation, generally speaking, it is the legal guardian of the child who the Supreme Court prefers as administrator[20]. In the context of extant family law proceedings this will often be the surviving parent of the children, the very same person who is on the other side of the Family Court proceedings.

In such a situation, the Supreme Court may be persuaded that someone other than the surviving parent should be appointed administrator of the estate.

Questions will arise as to who should fulfil this role. The family of the deceased spouse will, no doubt, be convinced that the last thing the deceased would have wanted is for the surviving spouse to have control over the estate's the share of the matrimonial pool left for the benefit of their children. Depending on the family finances it may, or may not, be appropriate for the surviving spouse to retain the entirety of the asset pool to assist them with their own needs and their responsibilities in caring for the children. Someone needs to be able to consider matters from the children's perspective, having regard to the law, and determine whether the proceedings should be contested or settled, and if settled, on what terms.

The Court will be alert to the undesirability of having family members of the deceased who carry antipathy towards the surviving parent acting in the role, and where this situation arises, in my experience, the Supreme Court may prefer to appoint an independent legal practitioner as administrator, and thereby as the person entitled to be appointed under s79(8). However, as noted above, if the surviving spouse is appointed, and thereby becomes both applicant and respondent in the Family Court

[20] *Boaden, Collins, Philips, Sparke: Wills Probate and Administration Service, Victoria, Butterworth's [21,550].* This may even apply where the relationship of the parties has broken down, as in the case of *In the Estate of Soon (1882) 8 VLR (IP&M) 47, ibid [23,100]*

proceedings, it may be necessary to have someone else appointed in those proceedings to represent the interests of the children as third parties whose interests may be affected by the proceedings.

If the spouse is administrator of a deceased estate, even if the children's interests are separately represented in the Family Court proceedings, with them joined as third parties through the appointment of a case guardian[21], the practical problem arises that consequent upon the resolution of those proceedings that portion of the matrimonial asset pool which passes to the estate will ultimately come under the control of the administrator of the estate, who will then have a broad discretion to apply those funds towards the costs associated with providing for the children. The practical upshot of this may be that whatever the outcome of the Family Law proceedings, if the surviving spouse is the executor or administrator of the deceased's estate, the assets may pass to the control of the surviving spouse and may be freely expended during the children's minority such that there may be no estate preserved for the children when they turn 18.

On that basis it seems to me that in circumstances where parties to a relationship have separated, and are participating in Family Court property proceedings when one dies, and absent an executor validly appointed, it is generally appropriate for there to be someone other than the surviving spouse appointed as administrator of the estate (and not to merely rely upon the children's interests being represented as third parties to those proceedings). That way the interests of the deceased's estate in the fruits of the *Family Law Act* litigation can be managed balancing the short-term needs of the children for maintenance and support with the longer-term desirability of retaining a "nest egg" as a legacy of the deceased parent, by someone who is not in a position of potential conflict of interest.

Costs:

Once all is said and done is the legal personal representative entitled to an indemnity for the costs they have incurred in defending the Family Law proceedings?

It may come as a shock to some that answer is "maybe" and not an emphatic "yes".

There are at least two reported Victorian cases where executors in family law proceedings have been denied an indemnity with respect to their costs. In both cases the Court determined that the executors had not acted appropriately in bringing or defending the proceedings.

In one instance[22], one of two executors had retained solicitors, purportedly on behalf of the estate, without the consent of the other executor. The Court found that it was not proper for the executor to do so and refused the executor an indemnity for their costs.

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[21] See *Family Law Rules 2004 6.08A- 6.14, Federal Circuit Court Rules 11.08-11.15*

[22] *Beath v Kousal [2010] VSC 24*

In the other case[23] the executors of the estate of a deceased mother commenced proceedings seeking to require the father to return the child to Australia. About one year after the mother's death and in the midst of negotiations over a family provision claim, and negotiations over the child having contact with the maternal family, the father suddenly, without warning, took the child to live in the Netherlands. About four months and $47,000 later the executors applied to the Supreme Court for approval for their legal costs of the application for the child's return being paid from the deceased mother's estate. The Court was not satisfied that the application for the child's return was an appropriate use of estate funds and refused to approve the executors being indemnified for their costs.

In Paxton[24] (a judgement in a Federal Circuit Court case which received a good deal of informal attention from family lawyers due to its reference to "hero judges"), an order for costs was made personally against an executor who pursued a family law property claim on behalf of the husband's deceased estate. The judge found that the executor ought to have paid closer attention to the wife's parlous financial circumstances before deciding to pursue the litigation. His Honour found (@[85]):

> *[85]"…It was erroneous for Mr Paxton to have applied ordinary principles applicable to the administration of a deceased estate in the circumstances of this case. The wife was in extraordinarily straitened circumstances, a fact either known or which ought to have been known to Mr Paxton when he brought the application to continue with the proceeding…"*
>
> *….*
>
> *[91] "…As the party who maintained this proceeding he has failed in circumstances where he should not have maintained the proceeding in the first place. In those circumstances it is appropriate that a costs order be visited upon him."*

Whilst it should be noted that the orders as to costs were overturned on appeal[25] on the basis that the executor was denied procedural fairness, in that no submissions were heard on the question of costs, the case still stands as a warning that the payment of the executors costs from the estate should not be taken for granted in every case.

In each of these cases the executors would have been protected had they brought an application under Order 54 for approval from the Supreme Court for the conduct of the Family Court proceedings at an early stage.

Whilst it is by no means mandatory for executors (or trustees) to obtain court sanction to conduct litigation, it may be a prudent thing for them to do if there is any doubt at all concerning the merits or appropriateness of the proposed course.

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[23] *Re Steiner [No 2] [2013] VSC 357*

[24] *Paxton [2016] FCCA 1689*

[25] *Paxton [2017] FamCAFC per Bryant CJ, Kent and AustinJJ*

I am aware of cases where the Family Court has, simultaneously with a s.79(8) appointment, has made an order allowing the legal personal representative's costs in the proceeding to be paid from the deceased's estate. In at least one example this was done at a very early stage, immediately following the death of the party, and in the context of a s79 (8) appointment being made prior to a grant of probate or letters of administration.

Suffice to say that there are differences in lore as well as law between the jurisdictions. The Supreme Court will grant a so-called *Beddoe*[26] application (authorising the application of estate funds towards the costs of litigation on behalf of the estate) but usually only on the provision of sufficient evidence that the pursuit of the litigation is a proper step for the executor to take, and preferably in advance of the costs being incurred.

By making a costs order in general terms at a very early stage in the proceedings the estate is, potentially, being exposed to costs being unreasonably or unnecessarily incurred by the legal personal representative, without judicial oversight. Nevertheless, if you are acting for a legal personal representative being appointed pursuant to s79(8) it would certainly be in your client's interest to seek such a pre-emptive cost order in the Family Court.

Generally though the executorial costs and commission in the estate administration will be a liability taken into account in the Family Court proceedings in reduction of the asset pool available for division, and the estate's cost of the Family Court proceedings will be left to be paid from the assets which flow to the estate following the determination of the Family Court proceedings[27].

Take outs:

1. Have your clients make wills:
Much of the complexity referred to above can be overcome by family lawyers ensuring that at the very early stages a relationship breakdown their clients make new Wills (assuming they have capacity). The Will need not be elaborate, but they should identify who your client wishes to have as representative of their estate, and who the estate is to be left to. The formal requirements of the Wills Act are easily met, and a basic will can be prepared and executed as an important stopgap even where the client's circumstances suggest that more sophisticated and nuanced estate planning may ultimately be required.

2. Where a client dies:
Where a client's dies before family law property proceedings are concluded, particularly if there is and intestacy, doubt about the existence of a valid will, or the named executor does not wish to be appointed, give urgent consideration to who might be appropriate to have the carriage of the proceedings, and the estate administration, at an early stage

[26] *Re Beddoe[1893]1 Ch547*, see more recently: *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand [2008] HCA 42*

[27] *see Brown v Murdoch (No3) FamCA 1005 [168] – [174] and Flanagan & Sobek [2014] FamCA 696 [27]-[30] and [81].*

and don't get caught napping while someone else applies, and obtains, a grant of representation in the Supreme Court.