

FOLEY'S | LIST

THE INTERSECTION BETWEEN FAMILY LAW AND DECEASED ESTATES

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The Intersection between Family Law and Deceased Estates

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INTRODUCTION

We live in a community with an aging population in which there is an increasing tendency for people to enter into second or subsequent marriages, or long term domestic relationships. This necessarily leads to complications around the blending of families and potential conflicts of personalities and financial interests. In addition the longevity afforded by advances in medical science is leading to prolonged periods of life with dementia. The law is grappling with issues surrounding “family” asset control and division in the context of relationship breakdown, death and incapacity on an ever increasing basis.

In addition to base financial motivations and underlying interpersonal conflict between key players, there is an added dimension created by the potentially profound impact grief can make on people’s capacity to make reasonable decisions.

It is in this context that streams of law with quite distinct origins and approaches meet and interact, often in circumstances of high emotion and deep conflict.

The interaction of these areas of law can create unexpected outcomes and it is important for advisors and litigators in any of these areas to be conversant with the key issues across other areas.

Relevant areas include:

1. The law relating to incapacity (guardianship and administration, enduring powers of attorney and litigation guardians).
2. Family law maintenance and property division (including binding financial agreements).
3. Property law /joint tenancies / abatement / constructive trusts.
4. Discretionary (family) trusts.
5. Superannuation.
6. Wills and estate planning.
7. Estate administration.
8. Testator family maintenance applications.

Generally the advisor wishes to assist his or her client in determining the management and/or allocation of the client's wealth in the event of death, incapacity and/or marital breakdown, in accordance with the client's wishes, with minimum prospect of interference by courts, in the most tax effective way.

Generally the litigator wishes to advance the client's objective of either upholding or challenging an estate plan, or to the extent there is none, furthering the client's perspective of appropriate management or allocation of the wealth of a deceased or incapacitated person.

The topics thrown up by the confluence of laws in this area are potentially boundless. This paper is intended to canvas of some of the issues that have come to the fore in cases that have crossed my desk in in recent times. It is by no means comprehensive and deals largely with issues around property division following death of a party to relationship under the *Family Law Act* and the *Administration and Probate Act*. Inherently it deals with the position under Victorian law.

The paper is not intended to be a detailed and comprehensive discussion of all relevant issues (that would take a book). It is intended to raise awareness in practitioners in each jurisdiction (wills and estates, and family law) of the approach adopted in the other to common issues, and to raise awareness of the individual issues that arise in the different areas of practice.

I begin with a table setting out in summary form some of the key issues, and then discuss their practical application in the context of a hypothetical, the case of Jack and Jill.

Table of Key Issues:

Issue	Family law	Trust & Estate law
Approach to property division between spouses	A discretionary judgement based on an assessment of the history of the relationship with weight given to financial and non-financial (homemaker) contributions, potentially with an adjustment based on an assessment of the parties' competing future needs. The process involves a discretionary evaluation of the weight to be attached to each relevant fact found to be proven, and the determination of a just and equitable outcome.	In claims for further provision from an estate brought by a surviving spouse similar discretionary considerations apply although arguably there is a greater focus on future needs with the yardstick of provision of a home, income, and a capital sum for future contingencies being a reference point where an estate is of a sufficient size to accommodate the claim.
Property proceedings after the death of one spouse	The powers of the court cut both ways: in theory the court can order the estate to transfer assets to the surviving spouse, or the surviving spouse to transfer assets to the estate.	It is a one-way street: the property of the surviving spouse is not available to satisfy claims of the estate.
Relevance of the needs of third parties	In properly proceedings between a surviving spouse and a deceased spouse's estate the strength of the moral claims of third parties to share in the bounty of the deceased are largely ignored <i>Flanagan v Sobek [2014] FamCA 696 [11]</i> (although the claims of third-party creditors can be relevant to determining the assets available for division between the parties to the relationship).	In proceedings for further provision from an estate the claims of a plaintiff spouse are weighed-up having regard to the claims of other persons (including the deceased's children). However, in many cases the claim of the surviving spouse may be viewed as taking precedence over other claims.
Treatment of superannuation	There is a specific part of the Family Law Act (Part VIII B) dealing with the court's power to make orders with respect to a party's interest in superannuation.	Unless trustees resolve to pay a members death benefit (including any insurance component) to an estate, superannuation proceeds are beyond the reach of the court in a Family Provision Claim.
The meaning of "property"	An expansive conception of property is applied in Family Law proceedings. It extends to the assets of trusts in which a party is found to have a sufficient interest (particularly with the party either controls, directly or indirectly, the trust or where a party is responsible for contributing to the trust assets: <i>"property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which a party can have"</i> <i>Kennon v Spry[2008] HCA 56per French CJ [54]</i>	Traditional notions of property are employed so that, for example, the deceased's interest in jointly held real estate and any interest in a discretionary trust, is not property available for division. In jurisdictions that employ the concept of "notional property" in dealing with property disposed of by the deceased prior to the death courts have greater latitude in bringing into account a broader range of property.

	Further, the court has expansive powers to set aside transactions (e.g. <i>inter vivos</i> transfers) which are intended, or have the effect of, defeating the claims of the other spouse (s.106B FLA)	
The impact of separation /divorce on standing	Proceedings for the division of property can be determined in the context of an intact marriage, but the breakdown of a de facto relationship is a prerequisite for jurisdiction in de facto matters. In both cases proceedings can be continued after the death of one party.	<p><u>Wills</u></p> <p>A marriage revokes a former will not made in contemplation of the marriage, the commencement of a de facto relationship does not.</p> <p>A married spouse's entitlement under a will survives separation, but abates on divorce (the entitlement of the deceased's stepchildren, being the children of the divorced spouse, survives a divorce).</p> <p>Separation has no impact on a de facto spouse's entitlement under a will, and as there is no divorce or equivalent step, their interest continues until the will is revoked.</p> <p><u>Intestacy</u></p> <p>A married spouse's statutory entitlement on an intestacy is not altered by the breakdown of the relationship, but abates with divorce.</p> <p>A de facto spouse's statutory entitlement on an intestacy abates on the breakdown of the relationship.</p>
Costs of the proceedings	<p>Under section 117 the starting point is that each party pay their own costs of the proceedings. The court will allow the costs associated with the estate administration (as opposed to the family law proceedings) to be deducted from the pool of assets available for distribution as liabilities (e.g. <i>Cornell & Stokes [2008] FMCAfam 774 (25 July 2008) @ [25]</i>)</p> <p>Generally the estate pays its costs in the family Law proceedings from the estate assets remaining following the property division with the surviving spouse.</p>	Often all the costs of the proceedings are deducted from the pool of assets prior to the determination of the claims. It should be noted, however, that increasingly costs orders are being made against one or other of the parties, a trend which can be expected to continue in light of the January 2015 amendments to the <i>Administration & Probate Act</i> repealing the old s.97(7) which required a finding that a claim was frivolous, vexatious or made with no prospect of success before costs would be ordered.

	Note there are cases, albeit in fairly unusual circumstances, where executors have been refused an indemnity for their legal costs in FLC proceedings from estate assets, and have been required to pay them personally. <i>Beath v Kousal [2010] VSC 24, Re Steiner [No 2] [2013] VSC 357</i>	
Commencement of proceedings	Proceedings for property division cannot be commenced after the death of a party (the commencement of proceedings for leave to bring proceedings out of time is sufficient).	Proceedings can only be commenced for further provision from an estate after a party has died within 6 months of the grant of probate or later with leave, to the extent that the estate remains undistributed (see A&P Act s.99).
Which proceedings take priority?	Family law proceedings determine the assets available for distribution via the deceased spouses estate, and Family provision claims must wait: <i>Harry & Harrison and Ors [2011] FamCA 457 @ [42], and @ [37] quoting Brennen in Fisher v Fisher (No. 2) [1986] HCA 61, Capelinski & Patton [2010] FamCA 1243 @ [29]</i> although family law proceedings may be stayed, in appropriate circumstances, pending determination of other proceedings in which the estate is a defendant (see <i>Bailey v Bailey [1989] FamCA 45</i>)	
Continuation of proceedings	Proceedings may be continued following the death of one party <i>FLA s.79(8)</i> (including appeals and applications for leave to appeal <i>Somerton & Wells And Anor [2014] FamCAFC 30 [46]</i> . <u>Representation of Deceased:</u> Previously a strict view requiring a grant of probate or letters of administration before any further could be taken in the proceedings. Only the executor / administrator appointed by the Supreme Court could be appointed in the family Law proceedings (e.g. <i>Harry & Harrison (Deceased) And Ors [2011] Famca 457, Fletcher & Jones [2014] FamCA 870</i> . There has been some softening of this approach.	N.A.

	<p>The court has held that a person named as an executor can be joined to the FLC proceedings in his own name, and then substituted for the deceased when the Grant had been made: <i>Cullen & Cullen</i>[2011] FMCAfam 375 [36] Where an executor is named in will, where there is no dispute concerning the validity of the will, and where the executor has indicated their intention to apply for probate, the Court has appointed them as LPR without a grant first being made <i>Murdoch & Brown (No.2)</i> [2013] FamCA 732, per Cronin J</p> <p><u>Orders Pending Appointment of LPR</u> Injunctions for the use and preservation of property have been granted prior to the grant being made (<i>Wickens v Brown</i> [2014] FCCA 373 per Altobelli J).</p> <p>In <i>Randle & Randle</i>[2014] FamCA 248 the court held that its power to make final orders under s.79(8)(b) could be exercised prior to the appointment of a LPR under s.79(8)(1) [99]-[101]. This issue is the subject of a reserved judgement of McMillan J of the Family Court of Australia.</p>	
Making of orders on the claim	<p>When one party has died at the court may only proceed to make orders if it determines that it would have made orders had the deceased party not died, and that is still appropriate for orders to be made s.79(8)(b)(i)(ii). The court ought not interfere with the existing property rights of the parties without a principled reason for doing so. <i>Stanford and Stanford</i> [2012] HCA 52 @ [41]</p>	
Death of surviving spouse	<p>The generally accepted position is that proceedings abate <i>Vessey & Vessey</i>[2012] FamCA 386 (but this was apparently questioned in <i>Capelinski & Patton</i> [2010] FamCA 1243 (7 December 2010) @ [39])</p>	Proceedings abate
Impact of family law property orders on a claim for further provision by a surviving spouse		<p>Generally speaking the fact that final property orders have been made under the Family Law Act will bar a successful claim by that spouse under the family provision legislation. There are exceptions</p>

		such as where there has been resumption in the relationship subsequent to the making of the family law orders, where the family law orders were obtained by fraud or duress, or where at the date of death there was an ongoing maintenance order against the deceased spouse in favour of the surviving spouse. However absent some special circumstance the claim will fail. e.g. <i>Galvin v Semkiw</i> [2013] VSC142 . I have succeeded in having such a claim summarily dismissed with costs by the SCV.
Accrued jurisdiction	Each court can deal with issues arising for determination under the legislation of the other's jurisdiction but may only do so where the criteria for exercising accrued jurisdiction are satisfied (in summary, that there is a relevant "substratum" of the common facts between the extant proceedings in which the jurisdiction of the court has been properly invoked, and the issue arising under the other jurisdiction. (e.g <i>LL Pty Limited & Dawson and Ors</i> [2015] FamCA 709 (27 August 2015))	As per family law
Orders for the use of assets pending trial	Applications for the "sole use and occupation" of a matrimonial property are "grist to the mill" in the family law area. These cases are dealt with in the court's busy duty lists on a daily basis. This fact is an important consideration in cases where, for example, the surviving spouse has left the matrimonial home and is living in rental accommodation when the other spouse dies. <i>Wickens & Brewer & Ors</i> [2014] FCCA 373.	It is highly unusual for an application to be made to the Supreme Court by a beneficiary of an estate, or a plaintiff in a family provision claim, to be provided with an interim right to occupy and use the estate asset pending trial.
Invoking the family law jurisdiction by the attorney or administrator for a person who has lost capacity	One scenario thrown up by blended families is the appointment of the adult children of an earlier relationship under an enduring power of attorney executed by a party to a second or subsequent marriage. Often the children of the earlier marriage will be in direct financial competition with their parent's new spouse. Often there is ill feeling either	

	<p>simmering below the surface or out in the open between the two camps. In this context, particularly where the parent has to go into supported accommodation, the children may seek a division of property, and even the sale of the (perhaps jointly owned) matrimonial home to fund accommodation bonds.</p> <p>NB- Jurisdiction in de facto cases depends on the breakdown of the relationship, and if the applicant has lost capacity breakdown may be difficult to prove.</p> <p>Even in cases of marriage, or where de facto breakdown is established, the Court may still determine that it is not appropriate to make a property order, particularly where the separation is forced by circumstances like incapacity: <i>Stanford</i> [2012] HCA 52)</p> <p>Whilst the attorneys have the power to commence proceedings for their principal, when confronted with a client seeking to do so on behalf of another, consider carefully whether final property orders are actually required in order to see that the parent is properly accommodated. It may be that voluntary support provided by the other spouse is sufficient to ensure the parent's needs being properly met. It may be that, rather than a division of property, orders for periodic maintenance are sufficient to satisfy those needs. It ought not be assumed that simply because the parent has an arguable need for capital that the claim will succeed, and in circumstances where the court forms the view that the child/attorney commenced the proceedings for the ulterior motive of enriching themselves or their parent's estate, it would be within the power of the court to make a costs order against them personally.</p>	
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The Scenario: the case of Jack and Jill.

Jack and Jill are defacto partners. Jack and Jill have been living together for 14 years. Jack is aged 82, Jill is 76. Jack and Jill met shortly after the deaths of their respective partners. They each have adult children from their first marriages and grandchildren under the age of 18.

When they met Jack owned his home in Hill Street and had a substantial share portfolio. Jill also owned her home, a rental property and had \$120,000 invested in term deposits.

Jack and Jill live in Hill Street. After Jill moved into live with Jack she sold her home. With part of the proceeds of sale she renovated Jack's home, putting in a new kitchen and an ensuite.

All in all it is a fairly typical "blended family" scenario.

Jack didn't like his children. He had fallen out with each and everyone one of them over the years and no longer was in regular contact with any of them.

Jack executed a Will leaving his entire estate to Jill. Jack had heard of children contesting Wills and he was very concerned that they not be able to get a cent from his estate.

Jack had sought advice from a solicitor who suggested that he register the title to Hill Street in the joint names of himself and Jill and that he create a discretionary trust to hold his investments, with himself and Jill as the primary beneficiaries, joint appointors and co-trustees of the trust. Jack took that advice. The trust was created and the share portfolio transferred into the trust.

Unfortunately, one day whilst walking up Hill Street to fetch a bottle of Mount Franklin from the local shop, Jack fell down and suffered a significant head injury. Then things tumbled "downhill" for Jill. Although Jack emerged from the incident with no apparent lasting physical injury, his personality appeared to have changed and he became aggressive and threatening towards Jill.

Jill left Jack and moved into rental accommodation.

It was suggested to Jack that he and Jill attend relationship counselling at Kings, Horses and Men's Family Therapy Centre, but Jack declined, having discussed the matter with his friend, Mr H. Dumpty, who had a disappointing experience with their services.

Jill accepted that they would never be able to put the relationship back together again. Jill instructed her solicitor to write to Jack seeking finalisation of their financial affairs.

One month after separation Jack was diagnosed with an aggressive cancer. His doctors gave him 4 to 8 weeks to live.

Now Jack does not want either Jill or his children to benefit from his estate.

Advising Jack

Jack comes to you seeking to execute a new Will leaving one quarter of his estate to be distributed evenly between his grandchildren and the balance to be held on a discretionary perpetual charitable trust.

Jack's obvious problem is that he has almost no property to pass under his Will. Hill Street will pass to Jill by survivorship and Jill will retain control of the investment portfolio via the trust. Jill takes the lot.

Jack anticipates that Jill has no inclination to renounce her interest in the trust, or to consent to a severance of the joint tenancy.

What is Jack to do?

Jack should immediately execute and lodge a transfer of his interest in his home from himself as joint tenant to himself as tenants in common. This should bring at least 50% of the value of the property into his estate.

I would also suggest Jack consider commencing proceedings under the *Family Law Act* for property division as a matter of extreme urgency.

By commencing proceedings under the *Family Law Act* Jack brings all the assets of the marriage into play. Those assets include assets held solely in Jill's name and, significantly, the trust assets.

In this case there is no doubt that their interest in the trust, and for practical purposes the trust assets, will be considered matrimonial property for the purposes of the Family Court proceedings (read also as *Federal Circuit Court* proceedings under the *Family Law Act*), as will both Jack and Jill's interests in Hill Street (whether or not the joint tenancy is severed), because:¹

1. The trust was created during the marriage.
2. The assets were contributed to the trust during the marriage.

¹ See *Kennon v Spry* (2008) HCA 56

3. The parties were appointors and trustees.
4. They were the specified beneficiaries.

The question of when an interest in a trust (or the underlying assets) will be considered property of the parties for the purposes of family law proceedings is interesting, complex and dependent on the facts of each case. Key facts may include:

1. Who is the appointor of the trust?
2. Who is the trustee of the trust?
3. The terms of the trust.
4. The origin of the assets of the trust- Is there a noxious to the relationship?.
5. When the trust was created.
6. The history of the trust administration.
7. The history of distributions.

Kennon and Spry (cited above) is the leading authority on the issue. Other cases demonstrating interesting applications of the law in this area include *B Pty Ltd & others & K & Anor* [2008] FamCAFC 113, *AC and others & VC and Anor*[2013] FamCAFC 60, and *Harris* [2011] FamCA FC 245. The topic is broad and detailed and I will not address it further here, suffice to say that in Jack and Jill's case we can be confident that the trust assets will be included in the pool.

The Court will then be called upon to determine whether there should be orders dividing the parties' property and if so what share of the asset pool will pass to Jack's estate (in accordance with the process mandated by s.79 and s.75(2) of the Family Law Act), having regard to the contributions of the parties and their respective needs.

The practical upshot of this will be that, in all likelihood, a significant portion of the Jack and Jill's matrimonial wealth will pass to Jack's estate. How significant that portion is will naturally depend on the history of the relationship and Jill's needs. The assets passing to Jack's estate will be available to be distributed in accordance with his Will (or in the circumstances suggested in the scenario, in accordance with his Will as amended in consequence of any family provision claims which may be commenced against his estate).

Advising Jill

Let us assume the scenario above, but that it is Jill who seeks your advice. Should Jill commence proceedings in the Family Court?

No! As things stand she seems to have nothing to gain. She gets the house and control of the trust on Jack's death, none of which will be vulnerable to claims by the charities or Jack's children (at least under Victorian law), without exposing any of the assets already in her name.

But let's amend the scenario.

Assume that:

1. There is a trust, but it is solely controlled by Jack and it is expected that Jack will make the necessary election of appointors, amendments to the trust deed and the like to ensure that neither Jill nor Jack's children benefit from it following his death.
2. The home is registered solely in Jack's name.
3. Jack has no Will.

It follows that, all things being equal, the trust assets will not fall into his estate and will not be available in claims made under the *Administration and Probate Act*.

As a separated de facto, Jill probably has no *prima facie* entitlement under the intestacy provisions of the *Administration & Probate Act* to an interest in Jack's estate. Any claim she may have against his estate will be a claim for further provision under the testator family maintenance provisions of Part IV of that Act and or based on an equitable claim, for example constructive trust.

In the circumstances she could be expected to have a good "TFM" claim, but the trust assets will not be available. It will be her against his adult children who will otherwise take on an intestacy fighting over the home.

If Jill were to commence proceedings under the *Family Law Act*, her claim under that Act would determine the extent of the estate available for division among the children under the intestacy provisions and/or in any family provision claims.

As discussed above, in the family law proceedings the Trust assets would be likely to be brought within the available pool of assets (although the matter may be complicated somewhat by Jack's alteration to the trust) and may potentially require the setting aside of the deeds of variation under s.106B of the *Family*

Law Act. Jill will need to weigh her options, but it may well be that the Family Court is the way to go. Jill's contributions and needs will be taken into account when the court determines what she should receive from the pool of assets including the Trust and the house.

As an aside, it would be interesting to see how the Family Court would treat the trust *vis a vis* Jack's estate. After Jill's claim is satisfied from the matrimonial assets, would the Court leave the trust intact, or would it make orders effectively bringing the trust assets into his estate rather than leaving them to be administered under the terms of the trust? Below, I discuss the fact that in the family law proceedings it will be Jack's legal personal representative (i.e. his executor or administrator) who will have conduct of the proceeding. On an intestacy this will usually be the person with the greatest interest in the estate - i.e. a person with a direct financial interest in an outcome of the family law proceedings that would presumably like to see the assets move from the trust to the estate.

Now let's change the scenario further.

Jack and Jill are married rather than being in a defacto relationship. The intestacy provisions draw no distinction between cohabiting and separated spouses. As a spouse, on an intestacy Jill would be entitled to the first \$100,000 of Jack's estate and one third of the residue (with his children taking the balance). She would retain her right to make a claim under Part IV for further provision from the estate, which means she could potentially seek a greater share than the statutory one third of the remainder. Equally her *prima facie* statutory entitlement may be upset by a successful claim for further provision by, for example, Jack's children.

Therefore if they were married Jill would need to weigh the potential benefit of having the trust assets brought into account in Family Court proceedings as against the value to her of her statutory entitlement upon an intestacy - which may involve a detailed consideration of her contributions and needs under the *Family Law Act*. In a short marriage or one with a vastly unbalanced financial contribution, she may do better under an intestacy than in the Family Court - even with the inclusion of the trust assets.

Another issue that may influence Jill's decision to commence proceedings under the *Family Law Act* prior to Jack's death is whether she seeks to resume occupation of the home. Courts exercising jurisdiction under the *Family Law Act* deal on a daily basis with applications for sole use and occupation of a former matrimonial home. Faced with a living spouse in need of accommodation as

against a yet to be administered estate, one can expect that the spouse will be permitted to resume occupation of the house in many cases².

In contrast it would be highly unusual for the Supreme Court in its Probate jurisdiction to be asked to permit someone who is not an estate beneficiary (albeit a potential family provision claimant) exclusive right to occupy a house owned by an estate. (Noting that in the case of a married but separated spouse, section 37A may assist in the case of an intestacy).

Family law proceedings after the death of a party:

Proceedings are commenced by either Jack or Jill under the *Family Law Act* (noting that such proceedings cannot be commenced after the death of either spouse). Two weeks later Jack dies. What happens to the proceedings?

Under section 79(8) of the *Family Law Act* Jack's "legal personal representative" is entitled to be substituted as a party in the matrimonial proceedings. For the purposes of section 79(8) a legal personal representative is the executor or administrator of the estate of the deceased³. It is only such a person who is entitled to be substituted for the deceased in matrimonial property proceedings. Unless and until an appointment is made by the Supreme Court of someone in that capacity there is no one entitled to be substituted under section 79(8) (except perhaps in the limited circumstance where executors are named in Will, the executors have indicated that they intend to apply for probate and there is no controversy concerning the proposed appointment, in which case it has been found that the Court may proceed to make an appointment of the executor under section 79(8) prior to the actual grant of probate being made. ⁴)

Although some authorities describe the proceedings as suspended until a Legal Personal Representative is appointed, there are cases where the court has made orders against third parties, including proposed executors and administrators in their personal capacity, prior to the Supreme Court making an appointment⁵and the s.79(8) order being made.

² See e.g. decision of Altobelli J *Wickens & Brewer & Ors* [2014] FCCA 373

³ See for example *Korsky & Bright & Anor* [2007] FamCA 245, *Strellys* (1988) FLC 91-961, *Cullen & Cullen* [2011] FMCAfam 375 and *Midhurst* [2008] FamCA 393

⁴ See *Murdoch & Brown (No.2)* [2013] FamCA 732, *per Cronin J*

⁵ E.g. *Wickens & Brewer above*, *Cullen & Cullen* (2011) FMCFam 375, *RANDLE & RANDLE*[2014] FamCA 248

Spouses as Administrators

An issue can arise where the married but separated spouse dies intestate as to who is to be appointed administrator and therefore be eligible for appointment under s.79(8). Generally speaking, the person with the greatest interest under the intestate estate will be considered appropriate. This will usually be spouse of the deceased and/or the surviving parent of their children⁶. This may even apply where the relationship of the parties is broken down, as in the case of *In the Estate of Soon (1882) 8 VLR (IP&M) 47*⁷.

Having said that and although I am not aware of a specific case on point, it appears clear that in circumstances where there are extant proceedings under the *Family Law Act* for the division of matrimonial property the general position set out in the foregoing paragraph requires further consideration. In the present case for example, were Jill appointed as administrator of Jacks estate she would be both applicant and respondent in the Family Court proceedings and self evidently hopelessly conflicted in duty and interest with regard to those proceedings (in effect pitting her own personal financial interests against those of the children).

For a recent example of a case where the Supreme Court has refused to appoint a legal personal representative due to conflict of interest see *Mataska v Browne* [2013] VSC 62.

In *Mataska* the deceased was survived by her two daughters. One of those daughters was the sole executor and sole beneficiary of her estate. Shortly before the deceased's death that daughter had a property recently purchased by the deceased registered in their names as joint tenants.

The sister who had been "left out" sought a limited grant of probate to enable her to investigate the dubious transaction on behalf of the estate, on the basis that if she successfully impeached the transaction she would then be in a position to commence proceedings for further provision from the estate under Part IV of *The Administration and Probate Act* (as there would then be assets in the estate against which such a proceeding could be pursued). A limited grant was made, the Court determining that the executor/sister had a conflict in her capacity as executor and as the beneficiary of the impeached transaction.

An administrator/spouse who is also a party in family law proceedings against an estate appears to have ostensibly the same conflict as the named executor in

⁶ Reference is made to *Boaden, Collins, Phillips, Sparke: Wills Probate and Administration Service, Victoria, Butterworth's* [21,550]

⁷ *Ibid* [23,100]

Mataska - that is, she cannot be expected to meaningfully and diligently pursue an action against herself, being the family law property proceedings.

It therefore appears tolerably clear that a spouse/ family law litigant may not be an appropriate person to be appointed administrator of the estate. The question then becomes who the Supreme Court ought to appoint as administrator?

The Court could conceivably appoint one of Jack's adult children, a licensed trustee company or an independent solicitor as administrator of Jill's estate. This may be a limited grant for the purposes of the Family Law proceedings. Who is considered appropriate and on what terms will depend on the circumstances.

Where a grant of probate has been made to a separated (undivorced) spouse the Family Court has permitted the FLC proceedings to continue with the spouse being both applicant and respondent, with estate creditors being able to seek to participate as third parties to protect their interests (*Bailey v Bailey*(1987) FLC 91-803). However I note there are distinctions between a claim of a discrete debt or damages against the deceased estate by an independent third party (where there may be a coincidence of interest between the surviving spouse and the estate in defending the claim) and the situation where the surviving spouse and others interested in the estate (perhaps by way of Part IV claim, or the children of a former marriage under the will or intestacy) may have competing and opposed interests in the success of the estates case in the family law proceedings, such as to warrant someone other than the spouse representing the estate.

How does death impact upon the orders to be made under the Family Law Act?

The High Court considered proceedings continued under s.79(8) in the case of *Stanford* [2012] HCA 52. The Court must be of the opinion that "it would have made an order with respect to property if the deceased had not died" s.79(8)(b)(i) and that "it is still appropriate to make an order" s.79(8)(b)(ii). Those questions require consideration of the requirement that the court not make an order unless it is "just and equitable" to do so s.79(2) - see [24] & [48].

Broadly speaking in determining the division of matrimonial property under the *Family Law Act* the Court considers the parties' contributions and needs. Typically a judgment will affix a percentage to their respective contributions and then go on to consider the parties respective "needs" under s.75(2) and assign an adjusting percentage. Where one party dies there may be little impact on the court's assessment of the contributions of the parties (other than perhaps from an evidentiary perspective given that party is not available to give evidence or

instructions in the presentation of their case). However in most cases the surviving spouse can be expected to get a more favourable s.75(2) adjustment than they would had their ex survived, for the obvious reason that the deceased no longer has needs. Again the extent of any adjustment will depend on the evidence and the Court's exercise of its broad discretion.

The interaction of Family Provision claims and proceedings under the *Family Law Act*

Jack's children bring a claim for further provision from his estate under Part IV of the *Administration and Probate Act*.

Accrued jurisdiction

The Family Court (and other courts) has a broad power to deal with matters arising under the law of the Commonwealth and the States which arise in cases before them.

This often arises in Family Law cases. For example a husband alleges that money was lent to the parties by his parents and that there is a debt owing to them which needs to be deducted from the matrimonial pool. The wife says the money was a gift. The court will proceed to determine the matter applying the applicable state law, with the husband's parents being made parties to the proceedings if necessary.

A passage often referred to as describing the extent of this accrued jurisdiction of the courts derives from the judgment of Gummow and Hayne JJ in *Re. Wakim; ex parte McNally* [1999] HCA 27; (1999) 198 CLR 511 at 585 [140]:

There is but a single matter if different claims arise out of "common transactions in fact" or "a common substratum of facts", notwithstanding that the facts upon which the claims depend "do not wholly coincide". So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other, as for example in the case of third party proceedings or where there are alternative claims to the same damage in the determination of one will either render the other otiose or necessitate its determination.

Whether or not a Family Provision claim against a deceased spouse's estate would fall to be determined by the Family Court in the context of property proceedings under the *Family Law Act* involving the same estate is open to debate. If there were issues concerning ownership of property as between, for example, one of the deceased's children and his estate, then that would appear to fall more clearly within the jurisdiction. That claim may itself be tied up in a

Family Provision claim, which could conceivably be determined as part of the family law proceedings.

For a recent example for a case whether the Family Court transferred proceedings to a State Supreme Court, see *LL Pty Limited & Dawson and Ors* [2015] FamCA 709 (27 August 2015):

The key thing to be aware of is the existence of accrued jurisdiction and the possibility that it may lead to issues being determined in the Family Court which would usually fall under the province of the State Courts (or visa versa) and its potential relevance where there are both family law proceedings and deceased estate or trust disputes.

Relevance of the interests of beneficiaries.

Whether or not the Family Provision proceedings are determined in the course of the *Family Law Act* proceedings, or in separate (and presumably subsequent) proceedings in the Supreme Court, the question arises as to the relevance of the circumstances of the family provision claimants, or the estate beneficiaries generally, to the family law proceedings.

A starting point seems to be that a deceased party in family law property proceedings has a *prima facie* moral entitlement to the share gained by contribution during his or her lifetime and, if desired, to dispose of that share by will to persons who are strangers to the marriage⁸.

Mere recognition of contribution based entitlements does not, however, call upon a Court in family law property proceedings to weigh the interests and needs of the beneficiaries of the estate against those of the needs of the surviving spouse.

In some cases the interests of the estate beneficiaries seem to have been expressly ignored. In *Grace v Grace* [2012] NSWSC 976 (23 August 2012) the Court said:

243. The court does not take into account the claims or financial circumstances of the beneficiaries of the deceased spouse's estate [Menzies & Evans (1988) FLC 91-969, 77,010; Re Berry & Berry [1989] FamCA 76; (1990) FLC 92-118, 77,779; Mason v Hannaford; Mason-King

⁸ *In the Marriage of Tasmanian Trustees Limited (as Administrators of the Estate of Bryan John Gleeson) Appellant and Dawn Marie Gleeson Respondent* [1990] FamCA 65 (7 June 1990) at [28], *Healy & Healy* [2009] FMCAfam 351 (21 April 2009) at [46]

(1993) FLC 92-398, 80,055, 80,056, 80,057]. This means that the claim of or against the surviving spouse is to be considered essentially as between husband and wife before the claims of other beneficiaries are taken into account.

This passage was cited by Murphy J in *Watson & Ling* [2013] FamCA 57 (12 February 2013) at [9].

On the other hand in *Healy & Healy* [2009] FMCAfam 351 (21 April 2009) Coker FM said at [62]

“...In that respect, I am aware of the open-ended nature of the discretion available to the Court, as to whether or not it is to take into account the claims of the beneficiaries of the deceased spouse’s estate. See Menzies & Evans & Evans (1988) FLC 91-969, Re Berry (through the executor of his estate) & Berry [1989] FamCA 76; (1990) FLC 92-118 and Mason v Hannaford; Mason-King (Intervener) (1993) FLC 92-398”

The Court considered the needs of children of deceased mother (probably murdered by the father) in determining the division of property under the *Family Law Act* in *Ament & Ament* [2010] FMCAfam 1344 (8 December 2010).

It should be noted that certain provisions of the *Family Law Act* require the Court to have regard to the interests of third parties in altering property interests in proceedings under the Act(see s.79(10)(b) and s.90AE).

It appears that whether or not a Family Provision claim is joined with a proceeding under the *Family Law Act* under accrued jurisdiction, or left to be determined separately by the Supreme Court, there is at least an arguable basis for the beneficiaries of the deceased spouse’s estate having their interests taken into account and to participate in the proceedings (should, for example, they be concerned for any reason that the Legal Personal Representative will not act so as to protect their interests). For a discussion of the arguably analogous position of the beneficiaries of a family trust see *Freer & Freer (No. 3)* [2008] FamCA 516 (24 April 2008) at [10] – [12]. However it does not follow that, even if they are permitted to *participate* in the proceedings their financial needs will be considered relevant to the determination of the exercise of the discretion under s.79 and s.75(2) to determine the estate's share of the matrimonial pool.

What happens if Jill dies before the proceedings are concluded?

The court has no jurisdiction to determine proceedings where both parties have died. See *Estate of Mackenzie & Estate of Mackenzie and Anor* [2007] FamCA 882 (24 August 2007).

Settlement

Let us assume, based on the initial scenario where there is a Will, that all issues (both Family Law and TFM) are ultimately resolved in an omnibus mediation. The deal is that Jill retains the home and \$200,000, each grandchild is to receive \$5,000 (an amount significantly less than that which they would have received under the Will), and the balance is divided amongst Jack's adult children and.

How is the deal to be put into effect?

Because the settlement alters the interests of the minor beneficiaries, the proposed settlement will need to be approved by the Court (see *Supreme Court (General Civil Procedure) Rules Order 15*).

In the Supreme Court a litigation guardian would represent the minor beneficiaries' interests and the Court will need to be convinced that the proposed settlement is in their best interests.

The application for approval will need to be accompanied by an advice from Counsel that the proposed settlement is indeed in the children's best interests.

In addition, because the effect of the settlement is to do away with the discretionary perpetual charitable trust, the consent of the Attorney General will need to be obtained and he or she may be made a party to the proceedings for approval in his or her capacity as "protector of charity."

Conceivably the Family Court or the Federal Circuit Court could grant the approval to the settlement under its accrued jurisdiction, and the settlement would be then binding upon all parties, and enforceable.

Executors' costs of the Family Law proceedings

Once all is said and done, the question is asked "are the executors 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 instance⁹, 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.

In the other case¹⁰ 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 had suddenly, without warning, taken the child to live in the Netherlands. About 4 months and \$47,000 later the executors applied to the Supreme Court for approval of 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 this was an appropriate use of estate funds and refused to approve the executors being indemnified for their costs.

In each case 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 (see generally *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).

Can the surviving spouse bring a family provision claim in addition to his or her family law claim?

Ought Jill bring a claim under the Administration and Probate Act for further provision in addition to her claim under the *Family Law Act*?

There may be little point. The family law proceedings will determine the extent of Jack's estate (i.e. the estate will get what is left after the Family Court determines the share of the matrimonial pool to be retained by Jill). It is only in exceptional cases that a spouse will succeed in a testator family maintenance claim in circumstances where there has been a final division of matrimonial property under the *Family Law Act*. See for example *Galvin v Semkiw and Anor* [2013] VSC 142 (27 March 2013):

⁹ *Beath v Kousal* [2010] VSC 24

¹⁰ *Re Steiner [No 2]* [2013] VSC 357

26 Particular reliance was placed on the statements of Bryson J in Mulcahy v Weldon, in which his Honour observed that according to general community standards, a former spouse who has been accorded all rights under a property settlement and does not have any continuing entitlement to maintenance, is not generally regarded as a natural object of testamentary recognition. Although such testamentary recognition does occur, it is regarded as altogether exceptional and remarkable when it occurs.

Exceptional circumstances may include, for example, where there is a resumption of the relationship between the parties following the final order, where there is an existing and continuing maintenance order at the time of the paying spouse's death, or where there is an allegation that the matrimonial property settlement was obtained in circumstances of fraud or duress¹¹.

The need to update Wills

Whilst a marriage has the effect of revoking an earlier Will not made in contemplation of marriage¹², the commencement of a defacto relationship does not. It is not uncommon for a defacto to die after a relationship spanning many years leaving a Will predating the relationship which has no regard to the surviving defacto's interests.

In that situation the defacto has to bring a claim for further provision, with all the attendant costs and stress. It should not be assumed that the executors appointed under the Will (often the deceased's children from an earlier relationship) will be sympathetic to the surviving defacto's claim.

In addition interim or partial property division, or periodic maintenance pending determination of the proceedings, is commonplace in family law matters but unusual in the context of family provision claims, leaving those controlling the estate in the potentially tactically advantageous position of controlling all the disputed assets pending determination of the proceedings.

So in the context of an intact defacto relationship it is important that each party update their Wills.

Conversely, relationship breakdown excludes a defacto from entitlement under the intestacy provisions of the *Administration & Probate Act*, but does not impact on a spouse (unless the parties have become divorced, which itself requires a period of 12 months separation).

¹¹ see e.g. *Draskovic v Bogicevic*[2007] VSC 36, *Armstrong & Ors v Sloan & Anor*[2002] VSC 229), *Galvin v Semkiw and Anor* [2013] VSC 142

¹² Wills Act 1997 s.13

In neither case (defacto or marriage) does separation affect the operation of a Will, although divorce does.¹³

Proceedings where a spouse loses capacity prior to a relationship breaking down

An important case that all family lawyers are well aware of, but which is deserving of attention from trust and estate lawyers, is the High Court's decision in *Stanford v Stanford* [2012] HCA 52. That case was one where the parties' relationship (a second marriage, each with adult children from former marriages) had not broken down. The wife suffered a stroke and thereafter lived in supported accommodation. She developed dementia. Her daughter as her litigation guardian commenced proceedings under the *Family Law Act* seeking inter alia sale of the matrimonial home and division of the proceeds. The case raised issues about the powers and jurisdiction of the court in these circumstances and the appropriate order to be made. The following propositions emerge from the case:

1. That a marriage need not have broken down in order to court to have the power to make property orders under the Family Law Act [29]- noting that the position is different for de facto relationships, see *Banaszak & Executors of the Estate of Mr S Mandia and Anor (No 2)* [2015] FamCA 235 (9 April 2015)
2. Nevertheless, although the court has the jurisdiction, before exercising their jurisdiction so as to make orders for the final division of matrimonial property, a court must first consider whether it is "just and equitable" to make such orders.
3. In circumstances where there has been no breakdown in the relationship and therefore no severing of the implied community of property, it may not be just and equitable for the court to make final property orders.
4. In the circumstances the Court should have considered using its power to make maintenance orders to facilitate the appropriate accommodation of the wife, rather than proceeding to order a final division of property.

Conclusion

In the decision of the Full Court of the Family Court in *Stanford*[2011] FamCAFC 208, the Court quotes [at 71] the sagely words of his Honour Justice Kay of the

¹³ Wills Act 1997 s.14

Family Court in *Sterling and Sterling* [2000] FamCA1150 @ 26. That quote is an apt place to end this paper:

“...The problem which presents itself in this 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 whether it is appropriate that the Family Law Act be utilised as the means by which the competing claims of the next generation should be aired.”

Lachlan Wraith
Barrister
27 October 2015