



Family Law Property Settlement & Death of a Party

After married or de facto couples separate they need to formalise their property settlement between them and have it recorded by either a Binding Financial Agreement or Consent Orders in the Federal Circuit and Family Court of Australia (FCFCOA). The death of one of the parties has a significant effect on this process in a number of ways. This blog explores a recent case where one of the parties died during the process of filing an Application for Consent Orders in the FCFCOA.

In *Hullet and Benton [2022] FedCFamC1A 13* (11 February 2022), the Full Court dealt with the issue of whether an Application for Consent Orders should be dismissed following the death of the husband and withdrawal of the wife's consent.

The parties had had a long marriage and separated in 2018. They reached an agreement in respect of the matrimonial property settlement and in December 2020 filed an Application for Consent Orders in the FCFCOA. The wife was the Applicant and the husband was the Respondent.

The husband died in early 2021, just before the Application was determined. He had been diagnosed with cancer about 6 months before and had not told the wife. When the wife was advised of the husband's death, she notified the FCFCOA and her deceased husband's lawyers that she withdrew her consent to the proposed Consent Orders. The Registrar then dismissed the Application for Consent Orders. By dismissing the Application for Consent Orders, in circumstances where the husband was deceased, there would be no avenue for either the wife nor the husband's estate to pursue a matrimonial property settlement. Each of the husband's and wife's legal interests in property as at the date of death would remain as they were and the terms of the husband's Will would determine how his estate was distributed.

The deceased husband's Executor filed an Application to review the Registrar's decision and the wife responded to seek a dismissal of the Application. The question was whether filing an Application for Consent Orders constituted commencing proceedings for alteration of property settlement as this would invoke the Court's jurisdiction. If proceedings are commenced by either of the parties prior to the death of a party, those proceedings will continue after the death of a party and the deceased party's estate can continue those proceedings in their stead. The wife's argument was that the Application for Consent Orders was a different species of application to an ordinary application for property settlement, should be treated differently and that when she had withdrawn her consent the Court must dismiss the application.

The Court found that the filing of an Application for Consent Orders invokes the Court's jurisdiction under Section 79 of *the Family Law Act 1975* to alter the parties' interest in property in the same way that contested proceedings do. As such the filing of the Application for Consent Orders invoked the Court's jurisdiction and the husband had died after that application had been filed. Therefore, after the wife withdrew her consent for the Consent Orders to be made, the husband's estate could continue the case as contested proceedings. The property proceedings would not be discontinued as a consequence of the wife withdrawing her consent to Consent Orders.

The death of a party will have significant effect on either a matrimonial or de facto property settlement. It is very important to have expert family law advice when dealing with a property settlement such as in this case where the filing of the review application by the husband's Executor within the strict time limit was critically important.

If you would like to make a time to meet with [Ryan Thomas](#), head of Andersons Family Law team, please contact 8238 6666 or email enquiry@andersons.com.au