The Interaction Between Family Law and Succession Law - A Fact Sheet

Property Settlement and Succession Law

My spouse has passed away but we have not finalised property settlement. What are my options?
If Family Court proceedings have been commenced, and your spouse passed away before the matter is finalised, then your spouse's personal representative can continue the Family Court proceedings on behalf of your spouse.

Who is the personal representative of my spouse?
If your spouse left a Will then the executor has to apply for a grant of probate in the Supreme Court of Australia and once the grant is made, the executor, who is the personal representative of your spouse, now stands in the shoes of your spouse, and continues the court action.

If your spouse did not leave a Will, the *Administration Act 1903 (WA)* sets out the list of people who can apply for Letters of Administration and be appointed the administrator to manage your spouse's estate. Once the appointment is made by the Supreme Court of Western Australia, the administrator, who is now the personal representative of your spouse, can continue the Family Court proceedings on behalf of your spouse.

What if my spouse has passed away but we have not started Family Court proceedings before their death?
You cannot commence proceedings in the Family Court after the death of your spouse if proceedings had not been commenced during your spouse's lifetime.

My mother commenced Family Court proceedings to finalise property settlement with my father. My mother was involved in an accident and has since lost her capacity. I am the enduring attorney of my mother. Can I continue the Family Court proceedings on behalf of my mother?
Yes, you can.

My mother commenced Family Court proceedings to finalise property settlement with my father. My mother was involved in an accident and has since lost her capacity. I am the enduring attorney for both my father and my mother. Who can I represent?
As you are the enduring attorney for both of them, you cannot represent one parent, and at the same time act against the other parent. You have to resign as enduring attorney for one of them.

You can only resign as an attorney if the donor (the one who appointed you) has capacity. Since your mother has lost capacity, you cannot resign as her attorney, but you can resign as your father's attorney provided he still has capacity.
Once you have resigned as your father's attorney, you can then represent your mother in the Family Court proceedings.

My mother commenced Family Court proceedings to finalise property settlement with my father. My mother and father were both involved in an accident and both have since lost their capacity. I am the enduring attorney for both my father and my mother. Who can I represent?
As you are the enduring attorney for both your parents, you cannot represent one parent, and at the same time act against the other parent. You cannot resign as enduring attorney for both of them as they both have lost capacity. You need to make an application in the State Administrative Tribunal for decisions on who will be managing the affairs of your parents who have no capacity.

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Refer to our fact sheet on eLodgment of court documents for information on making an application at the State Administrative Tribunal.

My mother commenced Family Court proceedings to finalise property settlement with my father. My mother and father were both involved in an accident and both have since lost their capacity. I am the enduring attorney for both my father and my mother. I do not want to represent one and act against the other parent. What should I do?
You need to make applications in the State Administrative Tribunal to have your appointments revoked for both your parents. Refer to our fact sheet on eLodgment of court documents for information on making an application at the State Administrative Tribunal.

If there are no appropriate family members who can act on behalf of your parents, the Tribunal may appoint the Public Trustee as administrator (this administrator is different from the administrator appointed to manage the estate of a deceased person) to manage their affairs. This administrator's power ends the minute the person whose affairs they are managing dies.

Children's Matters

I have looked after my grandchild since she was one month old. My grandchild is nine years old now. Recently both her parents passed away. My daughter did not leave a Will. My daughter has a property in her sole name and I want to transfer the property to my grandchild's name. I have been advised that I need Letters of Administration. What do I have to do?
As per the *Administration Act 1903 (WA)* the only person who can apply for Letters of Administration is the child of your daughter.

Since the child is a minor, and both her parents are dead, the only person who can apply for Letters of Administration is the "guardian" of the child. You can make an application in the Family Court. Refer to our fact sheet on eLodgment of court documents.

You can start Family Court proceedings, get sole parental responsibility of the grandchild and then apply for Letters of Administration as the guardian of your grandchild. The sole beneficiary of your daughter's estate will be your grandchild.

I do not want my spouse to care for my children if I were to pass away. If I appoint my parents as the guardians of my children in my Will, will that be binding?
It is the Family Court which ultimately decides who has parental responsibility for the children.
The fact that you have nominated your parents as the guardian of your children is as if you are "speaking from the grave" and your wishes will be one of the factors taken into account in the Family Court's ultimate decision.

Wills and Divorces

I have a Will. If I marry after making my Will, is the Will I have still valid?
In Western Australia a marriage will revoke your Will. This means that any Will you have made prior to your marriage will be automatically revoked.

This is not the case if your Will is made in contemplation of marriage. If in your Will you have stated that you are making the Will in contemplation of marriage, then that Will is still valid even if you marry after making the Will.

If you are making a Will and have a pending marriage, it is advisable to include a clause within your Will stating that the Will is made in contemplation of marriage.

The Interaction Between Family Law and Succession Law - A Fact Sheet Continued

I made a Will in 1999. My divorce was finalised on 1 February 2008. Is my Will still valid or do I need to make a new Will?
Your Will is still valid. If you make a Will before 9 February 2008 and you then got divorced before 9 February 2008, your Will is still valid.

If you made a Will after 9 February 2008 and after that date you divorce your spouse, then that Will you have made is invalid. The important date to keep in mind is 9 February 2008.

If you have a divorce order made after 9 February 2008 but in your Will you have a contemplation of divorce clause, then the Will is valid even if you get divorced after making the Will.

In my Will my wife is the sole beneficiary of my estate. I have filed an application for divorce. Will my wife get my whole estate if I die before the decree absolute comes through?
If you are waiting for the divorce order to come through but you have not updated your Will, then when you pass away your existing Will is still valid and your wife will get your whole estate. This is because you have not been officially divorced.

If you die without a Will, your spouse, from whom you have not obtained divorce (that is, there is no decree absolute) may be entitled to a portion of your estate under the *Administration Act 1903 (WA).*

What if I am separated from my spouse but have not divorced him/her and he/she dies without a Will?
Under the *Administration Act 1903 (WA)* you are still entitled to share in the estate of your spouse as you are not divorced from the deceased. Note that this depends on other factors too.

Enduring Power of Attorney and Family Law

What happens if I divorce or separate from the person whom I have appointed as my attorney?
Separation or divorce will not affect the validity of an Enduring Power of Attorney. The appointor who wants their Enduring Power of Attorney to continue, does not have to take any action.

An appointor who no longer wants their former spouse or de facto partner to be their attorney, needs to revoke the Enduring Power of Attorney.

If the parties have separated or divorced and the appointer does not have capacity, and an interested party wants to be appointed as the administrator to manage the affairs of the person who has lost their capacity, that interested person can apply to the State Administrative Tribunal to be appointed the administrator replacing the former appointee. Refer to our fact sheet on eLodgment of court documents.

If I get married or start a de facto relationship, does my existing Enduring Power of Attorney become invalid?
No. Marriage or the commencement of a de facto relationship does not affect the validity of an Enduring Power of Attorney.

An appointor who wants their current spouse or de facto partner to be their attorney, rather than the person/s they previously appointed in an Enduring Power of Attorney, will need to revoke the Enduring Power of Attorney and make a new Enduring Power of Attorney appointing their current spouse or de facto partner as their attorney.

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Intestacy and Separation

I was separated from my spouse when they died without a Will. Am I entitled to share in their estate?
Yes, since you are only separated not divorced from them you are entitled to share in the estate of the deceased. Note that there are other factors which may affect the above answer.

I was separated from my de facto partner when they died without a Will. Am I entitled to share in their estate?
No. If you are separated from your de facto partner, you have lost your right to share in the estate of your deceased partner.

What if I am separated from my spouse and I have not lived with them for the past six years? My spouse had been in a de facto relationship for the past seven years. My spouse died without a Will. As their spouse am I still entitled to share in their estate?
Since you have not lived with your spouse since separation, and your spouse had lived with a de facto partner for more than five years, you as a spouse have lost all your right to share in the estate of your spouse.

The de facto partner is in the same position as you would have been, and the de facto partner will get whatever share a spouse is entitled to.

What if I am a de facto partner who is separated from my partner who then dies without a Will? We have three minor children together.
Under the *Administration Act 1903 (WA)* the only people who can share in the estate of the deceased are the children of the deceased. You as the separated de facto partner have no right to share in the estate of the deceased.

Since the children are minors, the only person who can apply for Letters of Administration is you as their guardian. You can make the application on behalf of the children. It is the children who will share in the estate of their parent, not you the separated de facto partner.

Ashes of the Deceased

My spouse died and their parents want to keep their ashes. Who has a right to the ashes?
Typically the person who is entitled to receive the ashes is the person who obtained the permit for the cremation or arranged the funeral., that person will be the spouse or the person named as executor in the Will of the deceased.

What if someone dies without a Will and there is dispute about the ashes?
If there is no executor to administer the estate, the *Cremation Regulations 1954 (WA)* outline the ranking of the persons who are entitled to the ashes in the following order:

- The spouse or de facto partner living with the deceased at the time of the deceased's death;
- The adult children of the deceased;
- The parents of the deceased;
- The adult siblings of the deceased.

Should I consult the other family members in relation to how the ashes of my spouse are to be dealt with?
Although there is no legal obligation for the person who has the ashes to consult other interested family members as to what should become of the ashes after the ashes are received, it is advisable to do so to avoid costly court proceedings.

Those who are next in rank in the hierarchy outlined above have no legally enforceable rights to insist on being consulted on how the ashes are to be dealt with.

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What if the funeral director refuses to release the ashes as there is much conflict in relation to the release of the ashes?
If no agreement is reached, the only option is to commence proceedings in the Supreme Court.

Harvesting Gametes from a Deceased Person

Western Australia has regulations which forbid the posthumous use of gametes. Prior consent must be given during the lifetime of the deceased for the harvesting of gametes. If there is consent, then harvesting the gametes is done under the relevant Health Act of the State.

In Australia, the law does not specifically address the issue of retrieval and use of gametes after a person's death if there is no prior consent. So, without supporting legal documents explicitly stating those wishes, the question of retrieval and use of gametes is not clear.

In most cases, an urgent Supreme Court order is needed to retrieve gametes. This is a problem because while the judge is coming to a decision, every hour that the sperm lies in the body after death decreases the chance of finding live sperm.

In *S v Minister for Health* the court granted an application for the removal and storage of sperm on this principle: the necessity to preserve the tissue pending an application for its use. It was held that the conditions of Sections 22 and 27 of the *Human Tissue and Transplant Act 1982 (WA)* had been met, and that the sperm was deemed to be property for the purposes of the court rules and could thus be removed for preservation.

Next of Kin
In Australia, there is no legal definition for the phrase "next of kin".

Although next of kin is not necessarily a legal term in Australia, next of kin can be described as a person's closest blood relative or somebody with a close relationship to a person (such as a husband or wife).

Who can be categorised as my next of kin?
In Australia "next of kin" generally means a "person responsible" for you or a "substitute decision maker" in case decisions need to be made on your behalf.

Your next of kin will be someone from those listed below in the following order:

- Your spouse or de facto partner;
- Your adult son or daughter;
- One of your parents;
- One of your siblings;
- Your primary unpaid caregiver; or
- A person who has a close personal relationship with you.

Note: that your next of kin must be:

- Aged 18 years or older;
- Of full legal capacity (able to act on your behalf);
- Available to be contacted; and
- Willing to be involved in any treatment decisions if needed.

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