reforms in this area of the law overdue but that the initiative for such changes must come from the legislature.

MRS TANNETJE L. BRYANT*

DEATH AFTER DIVORCE—UNTYING THE KNOT ONCE TOO OFTEN: EMMETT AND EMMETT

The Problem

The enactment of the *Family Law Act* 1975 (Cth.) has created a new class of disadvantaged litigant—the party whose former spouse dies after they are divorced but before the Family Court[1] has settled the property disputes of the parties. The problem arises because the Act, unlike its predecessor, the *Matrimonial Causes Act* 1959 (Cth.), provides for dissolution proceedings (s. 48) to occur separately from proceedings in relation to the property of the parties (s. 79). Indeed, a property application may now only be made subsequently to filing for principal relief[2] pursuant to the amendments reflecting the constitutional views expressed by the High Court in *Russell* v. *Russell*.[3] The Family Court has found in *Schmidt and Schmidt*[4] and *Sims and Sims*[5] that it has no jurisdiction to hear an action initiated after the death of a spouse under s. 79, or to continue proceedings which are pending at the time of the death even if all that remains is for the court to give its judgment.[6] This creates considerable hardship for the surviving spouse, in view of the now legendary delays in the Family Court's property hearing lists adding "time to die", particularly where the inaccessible estate is a large one and the would-be applicant's means are modest.

However, it is not only the surviving spouse in straightened circumstances who is affected. Any spouse with a credible claim in respect of assets of the other is prejudiced by a death after divorce resulting in loss of rights to a determination of that claim by the Family Court.

Succession rights under state law also fail to supply solutions. The antipathy which culminated in the divorce will almost invariably have motivated the deceased to disinherit the other party. Moreover, family provision legislation (testators' family maintenance) often provides no

* LL.B. (Hons.) (Melb.), LL.M. (Mon.), Dip.Ed. (Mon.), Barrister and Solicitor (Vic.), Lecturer in Law, Monash University.

1 Magistrates' Courts also have property jurisdiction under the Act (s. 39(2)) but for the sake of brevity the Family Court will be referred to in this work.

2 S. 4(1)(ca).

3 (1976) 134 C.L.R. 495.

4 (1980) F.L.C. 90-873.

5 (1981) F.L.C. 91-072.

6 *Sims and Sims* is probably needlessly restrictive. While there may be defensible reasons for the Court refusing to continue a hearing after a party has died because of the resultant change in circumstances and in the taking of evidence, the court's own delay in handing down the judgment of the Court should not be visited upon the surviving party.

other avenues. In New South Wales a divorced spouse cannot apply at all,[7] while in Victoria[8] a divorced "widow" may apply provided that she was "in receipt of or entitled to receive . . . maintenance".[9] Effectively in Victoria the exclusion from testators' family maintenance applies (i) to all ex-husbands and (ii) to an ex-wife who at the time of her death has sufficient income to preclude any maintenance entitlement. In the result, all divorced spouses in New South Wales, divorced husbands in Victoria and divorced wives not entitled to maintenance at the time of the death are precluded from making a claim against the estate of their ex-spouse even though the claim may have been a substantial one had it been able to proceed. Once the divorce takes place the doors of the Supreme Court and of the Family Court alike are closed to these people.

The Solution: The Judge is Faster than the Legislator

In principle there are ready solutions to the problems of death after divorce. A simple expedient is to amend the state Testators' Family Maintenance Acts so as to specifically enable a divorced party to bring a claim if there has been no decision of the Family Court in proceedings between the parties to the marriage resulting in an order altering their property interests under s. 79 of the *Family Law Act*. This would guarantee the right of every divorced spouse to a judicial determination of their property entitlements while ensuring that there would be no duplication of court proceedings. There would be no apparent difficulties in implementing such amendments but as yet no state legislature has felt moved to do so. Alternatively, the *Family Law Act* might be amended so as to allow maintenance[10] and property proceedings to be instituted or continued after the death of a party. Amendments to this effect are in part contemplated in the *Family Law (Amendment) Bill* 1981 (Cth.)[11] but like any federal legislation affecting succession it may need to first run the gauntlet of a constitutional challenge before its validity can be taken for granted.[12]

Faced with inaction by state legislatures and constitutional uncertainty in regard to the Federal Parliament's powers the Family Court has itself supplied a partial answer to the problem in the recent decision of *Emmett and Emmett*.[13] A majority of the Full Court (Fogarty and Elliott JJ.) came to the aid of a wife who sought to safeguard her family provision rights in relation to what would be a large estate of the husband (around $570,000) in the event of his death, by preserving her status as a wife. This was achieved by adjourning

[7] *Testators Family Maintenance and Guardianship of Infants Act* 1916 (N.S.W.) s. 3(1).
[8] *Administration and Probate Act* 1958 (Vic.) s. 91.
[9] Western Australia, Tasmania and Queensland have provisions similar to the Victorian one.
[10] There is provision for continuing an existing maintenance order after the death of the payee provided that the original order so provides (s. 82(3)), that leave is first obtained (s. 105(3)) and that the trustees of the estate do not succeed in cancelling the liability under s. 83(3).
[11] E.g. clause 27 provides for continuity of s. 79 proceedings after death.
[12] See *Johnston* v. *Krakowski* (1965) 113 C.L.R. 572; *Pertsoulis and Pertsoulis* (1980) F.L.C. 90-832.
[13] (1982) F.L.C. 91-212.

the husband's application for dissolution of the marriage until a property order of the Family Court could be made in a hearing in that court to be brought on "with all due expedition". The prospective loss to the wife in the event that there be a divorce after which the husband might die was a dramatic one in view of her own very modest means. As the parties were from New South Wales she would lose all rights to make a testator's family maintenance application upon divorce. Baker J. at first instance had acceded to the wife's request for an adjournment of the dissolution application notwithstanding that the husband was 54 years old and there was no suggestion that his health was poor or that there was any imminent risk of his death.

The husband appealed on the grounds that the Act had expressly separated divorce from ancillary hearings and that as the object of the adjournment was to preserve the wife's rights under state law it was made on the basis of extraneous considerations not relevant to the exercise of the court's jurisdiction to grant a divorce.

The Full Court majority upheld the adjournment on the grounds that the preservation of the wife's state property claim was an important practical consideration which was relevant and not extraneous to the exercise by the Court of its discretion to adjourn. Elliott J. added that it was open to the trial judge to adjourn the divorce application so long as he had not embarked upon a hearing of it. Having so proceeded in his Honour's view s. 48 would then have made it mandatory to grant the decree. The majority judges emphasized that the power of the court to adjourn a proceeding was always a discretionary one and if, for example, the husband had strong reasons for wishing to proceed with the divorce, the court would need to balance the competing needs of the parties and weigh the conflicting considerations in determining whether the discretion to adjourn an application should be exercised. It was stressed that any adjournment granted should be for the shortest possible time.

Asche S.J. delivered a strong dissent. He felt that the discretion to adjourn a proceeding was usually invoked by the court where there was a need to obtain better evidence or where there was some problem (e.g. in compliance with the *audi alteram partem* rule) associated with the proof of the substantive matter before the court or the special circumstances (e.g. illness) of a party, or even if the property application were listed shortly for hearing. Accordingly, the preservation of state law rights on succession, an endemic problem, was an extraneous consideration, and one which would have the effect of enabling every wife in New South Wales to request an adjournment of a divorce application. Indeed his Honour pointed out that a solicitor who failed to protect her rights in this way may be in breach of his duty to safeguard the interests of his client.

In the result *Emmett and Emmett* has produced a new phenomenon under the *Family Law Act*—the "quasi defended" divorce. Whereas divorce under the Act has been automatic on proof of the requisite twelve months separation[14] we may now witness a tendency of attempting to adjourn

[14] The chief defended cases have involved separation under the one roof, e.g. *Pavey and Pavey* (1976) F.L.C. 90-051.

wherever the other party has assets to which a testator's family maintenance claim may be made. Moreover, it should be appreciated that while there was some considerable disparity between the means of the husband and the wife in that case this is not a *sine qua non* of a state testator's family maintenance claim. Indeed, the benefits of retaining one's married status do not stop with family provision rights. Wives (and husbands for that matter) are frequently better protected in a range of legal situations (e.g. superannuation rights, fatal accidents claims, workers' compensation), and it may cogently be argued that these rights should also be grounds for an adjournment of dissolution proceedings until property rights are otherwise adjusted by the Family Court.

The Prognosis

The majority in *Emmett and Emmett* emphasised that adjournments would not be granted in the absence of compelling considerations. However, the prospect of applications for adjournments—even unsuccessful applications—raises the twin threats of delays in the divorce hearing lists (hitherto not a problem) and of jockeying for acceleration of property claims for priority by using the adjournment as a device. The prospect of a threatened adjournment may also be used by a party to achieve a better or faster property provision as the price for the other party's freedom. This is a development in the direction of the exploitation of the divorce as a weapon of extortion—a form of warfare which was removed from the battlefield of the divorce court by the *Family Law Act*. This was a major achievement of the new legislation. Its reversal in the guise of the adjourned divorce application is to be viewed with regret.

The majority decision in *Emmett and Emmett* is an unfortunate development. Asche S.J.'s dissenting view is, in this writer's view, to be preferred. The desire of the majority judges to safeguard the wife's position, laudable though it undoubtedly was, cannot justify the violence to the letter and spirit of the *Family Law Act* which dissociates proceedings from those in respect of property and other matters. The Court did, after all, have other expedients open to it. The husband suggested that the risk of his death after divorce was a risk in respect of which the wife might insure herself. Fogarty J. dismissed this as "hardly . . . a satisfactory answer to the present question".[15] Perhaps further consideration does need to be given to resolving problems of this nature by insurance. The wife's position may have been adequately safeguarded by requiring the husband to take out a policy of insurance naming her as the beneficiary in an appropriate amount in the event of his death by an order under s. 114(3) in support of the future s. 79 proceedings.[16] The premiums would be comparatively inexpensive, the wife would be substantially protected and legal principles would be left unscathed. Another expedient (which would assist a wife in Victoria but not, unfortunately, in

[15] At p. 77, 140.

[16] The ability of the Court to grant injunctions in aid of future s. 79 proceedings is now well established (*Stowe and Stowe*) (1981) F.L.C. 91-027. This may be extended to a mandatory injunction *Martiniello and Martiniello*: (1981) F.L.C. 91-050 infra.

New South Wales) would be the reintroduction into the maintenance powers of the Family Court of the ability to make a nominal maintenance order.[17] This would establish the wife's entitlement to initiate a testator's family maintenance application in the event that the husband did die subsequently to divorce. The proposed amendment to the Act providing for acceleration of the property applications so that they may precede divorce[18] will also alleviate the problem considerably, assuming that they are passed in the Parliament and that they withstand constitutional attack.

The problem of a divorced spouse (it is not confined to wives) losing substantial property rights in the event that the other party dies before a property settlement is a serious one. There is, fortunately, a variety of remedies which may be invoked. Probably the safest and simplest of these is reforming the state laws relating to family provision on death so as to enable a divorced spouse to apply if no property settlement has been arrived at. The adjourned dissolution application is an unwelcome expedient which opens up many new areas of difficulty. It is to be hoped, at least, that this device will be invoked most sparingly, or we shall witness serious mischief wrought by *Emmett and Emmett.*

DOROTHY KOVACS*

[17] This is currently not available—*Crossan and Crossan* (1976) F.L.C. 90-116. It may require an amendment to the Act to overcome *Crossan*, but such an amendment would clearly be within power. This amendment would also cure problems caused by the leave requirement in s. 44(3) where maintenance is not available immediately after divorce but changes in the applicant's circumstances or in the respondent's means give rise to a right to maintenance more than twelve months afterwards.
It seems that there must be an actual maintenance order or enforceable maintenance agreement in existence at the date of the death for a divorced wife to establish "entitlement" to maintenance within s. 91: *Krause* v. *Krause* (unreported, Supreme Court of Victoria, 26 March 1982).

[18] *Family Law (Amendment) Bill* 1981 (Cth.), clause 3 inserting a new s. 4(1)(ca).

* LL.B. (Melb.), LL.M., Senior Lecturer in Law, Monash University.