

What happens if I die before my property settlement is finalised?

Date: Monday December 6, 2021

Many separated partners try to resolve their property settlement as soon as possible. However, there are many reasons property settlements are not finalised as quickly as parties desire. There can be long delays, particularly if you are involved in litigation in the family court. In this blog, we explore what happens if one party dies before the property division is finalised.

There are many benefits to resolving your property settlement as soon as possible. In circumstances where it is likely you and your former partner no longer maintain shared goals and commitments, it is sensible and wise to sever financial ties immediately.

A consequence of delays is that sometimes a party to proceedings will die during the period between separation and the finalisation of their property settlement. Aside from the obvious distress this causes to families, it can also create unintended legal consequences and adversely affect and impact ownership or distribution of property.

Below is a brief summary of different scenarios where the death of one party can have an impact on your property settlement.

Death of one party when no family court proceedings are on foot

In this scenario, any legal interests of the deceased party will be retained by their estate and distributed according to their Will or in the absence of a Will, according to the laws of intestacy in the relevant State.

This scenario may significantly prejudice a party in a family law matter where, for example, assets were held in the name of one spouse only, and that spouse dies before their property settlement is finalised.

If there are no court proceedings, the surviving spouse will only receive the assets they have a legal interest in or assets provided

for in the Will of the deceased. They are unlikely to have any recourse with the family courts.

There may be alternative avenues for the surviving spouse, such as commencing proceedings under the relevant State family provision legislation. Family provision laws are different in each State. The purpose of these laws is to ensure fairness of a person's Will and provide for a Will to be challenged under certain circumstances. Family provision proceedings fall are outside the remit of the family courts.

It is worth noting that if any property is held by the parties as joint tenants and one party dies, the surviving party will automatically receive that property under the rule of survivorship.

Death before finalising property settlement but family court proceedings have commenced

If a party dies while there are active proceedings in the family law courts, then a legal personal representative will be appointed to act on behalf of the estate of the deceased person.

While the death of a party may have an impact on the potential distribution that the surviving party and the estate receive (for example, it will no longer be relevant to consider the future needs of the deceased), the court proceedings will otherwise continue as normal.

Although proceedings will continue, there may be other consequences, such as the calculation of the parties' property interests. For example, a superannuation binding death nomination may distribute the deceased's superannuation entitlements (the fund balance and any death or terminal illness benefit) to their children. Therefore, the deceased's superannuation will not form part of the asset pool for distribution (nor part of the deceased's estate).

Next steps and getting help from a family lawyer

The death of a party can create unwanted legal issues, depending on how assets are owned and if family court proceedings have commenced prior to the death of a party.

Separated parties should obtain legal advice about whether anything can be done to protect their financial interests in the period between separation and the finalisation of their property settlement.

Meillon & Bright's team of experienced family lawyers are familiar with all kinds of property settlement matters and work with individuals and families on a range of financial arrangements and with a number of experienced professionals, including commercial lawyers, accountants and financial advisors, to deal with the personal and financial circumstances of each separation.

The information contained in this article is of general nature and should not be construed as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.