

Can elderly couples separate without knowing it and what are the consequences ?

Surely a relationship only ends when one or both spouses make that decision. Perhaps not.

In **Stanford** [2011] FamCAFC 208 the Family Court addressed some challenging questions given our aging population and the number of second marriages and concluded that:

- a couple may have legally separated when ill health and frailty force them to live apart.
- the Court can make orders where the marriage is intact but where there is a physical separation and the absence of the normal elements of a marriage.
- the motives of the parties' children may not be relevant even if they are seeking to enhance their inheritances rather than advance the best interests of their parents.
- the moral and legal entitlements of a spouse survive their death for the benefit of their Estate.

The relevant facts in the Stanford case were as follows:

- After 40 years of marriage the husband and wife were both in their mid 80's and in poor health. The wife with dementia required nursing home care while the husband remained in the matrimonial home which was the main asset of the marriage with a carer.
- There were no children of this marriage.
- These proceedings were brought against the husband on the wife's behalf by her daughter.
- The proceedings were defended on the husband's behalf by one of his children.
- The orders sought would inevitably have involved the sale of the home.

The wife's claim was resisted by the husband on the bases that:

- The Family Court had no jurisdiction as the marriage remained intact; and
- The real motive of the wife's children was to increase the size of the wife's Estate and their inheritances (the wife's claim continued despite her death between the hearing and the Appeal).

Outcome:

The wife's Estate is to receive a substantial future payment representing her contributions upon the death of the husband or the sale of the home.

However the husband's Executor was granted leave to appeal this decision to the High Court (**Stanford** [2012] HCA Trans 206). The outcome of the appeal which was heard on 4 September 2012 is pending.

The bases of the appeal were essentially those matters referred to above which the husband's representatives had argued before the Full Court of the Family Court together with the fairly compelling argument that there is no legislative basis for the Court's reference to "moral entitlements".