

Property Settlement After Death

When one party passes away during property settlement litigation, it's not the end of the matter. Proceedings can still continue with the estate of the deceased party becoming the litigant AND ... some or all of their assets can still form part of the matrimonial property pool to be divided between the parties.

As a recent case highlights, navigating this area is not simple and if it's not done correctly, costs orders are at stake.

The Wife commenced Family Law property settlement proceedings and a few days later, the Husband passed away. After separation the Husband had completed a new Will naming his sister as the executor and his children as beneficiaries, and changed the beneficiary of a life insurance policy to a Trust which was to be managed by the executor for the benefit of his children. After the Husband's death, the insurance payment was made into the Trust. The first dispute which arose was whether the insurance money formed part of the estate which could be dealt with in property settlement. Ultimately it was conceded by the estate that it did, however by this time the lawyers for the estate had paid out over \$28,000 for legal advice to the executor with respect to the litigation from the insurance funds. (The estate was at that time represented by different lawyers). The Wife brought an application with respect to the payment.

The Court refused the Wife's application to join the estate's former solicitors or to recover the \$28,000. The Court said that this was a legitimate expense as the executor/Trustee was well within her rights to obtain legal advice for the purposes of administering the estate, and for that advice to be paid for from the estate funds. The sum paid was around 5-6% of the money when the Wife was only applying for 80% of the money, so there was still enough to satisfy the Wife's claim in property settlement at the time. The Court did note an "illogical" and "curious aspect of this case" that only the one payment of around \$28,000 was sought to be recovered on the basis it would defeat the Wife's claim in property settlement, however the estate had paid more legal fees after the \$28,000 and yet the Wife was not claiming to recover those costs.

There were other blows for the Wife's case. The Court also refused to order the previous solicitors (not the estate) to pay any of the Wife's costs on an indemnity basis, there were simply no grounds for the order to be made against the lawyers themselves, let alone on the indemnity basis.

The Court also refused the Wife's application for an order that the legal advice obtained by the executor be provided to the Wife. Legal advice is, of course, protected by legal professional privilege – a long established right that is crucial to the fair operation of the legal system. The Wife had claimed that the privilege had been waived (an argument based on the particular facts of the case). The Judge did not agree that the executor had waived the privilege over that advice and the Wife's application was described as "a fishing expedition".



Sarah Galvin

LL.B MQLS

Family Law Solicitor

PH: 07 55769999

E: sarahgalvin@robbinswatson.com.au

The Court did however restrain the executor from spending any more estate money, including on legal fees, as this further depletion could start to defeat the Wife's claim in property settlement. This order was made notwithstanding the Judge's acknowledgment that an executor is entitled to have reasonable litigation expenses paid for from those funds. The Judge took into account that the Wife was in difficulty paying her legal fees as well and considered that a restraint would "put the parties on the same footing".

Overall, some of the wife's application was successful, but most of it was not. The basis of the Orders sought by the Wife was changed between filing the application and the time of the hearing, so the arguments advanced at the hearing were different from how the case, and the documents, had been prepared. Costs of the application are being dealt with separately but no doubt this will be hotly contested as to bring, and defend, applications like this would have involved significant cost for all parties involved. Of course, in light of the order not to expend any more funds, the executor is now in a difficult position.

Clearly, this was not your average family law case. However, our experience is that links between estate issues and family law issues are quite common. We have specialised teams of lawyers both in family law and in all aspects of estate administration and litigation, and can assist with complex issues such as arose in this case.

Call us on 5576 9999 for a free 30min consultation with one of our lawyers.

To read the full case see:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCCA/2019/2433.html?context=1;query=chard;mask_path=



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