

CLARITY IN FAMILY PROVISION CLAIMS

Claimants need to get timing and wording right to prevent the distribution of estates.



A Victorian Supreme Court decision handed down in September 2021 serves as a good reminder of the importance of timing and accuracy of written expression when making family provision claims in Victoria.

In *Re Haddow: Haddow v Haddow*¹ a family provision application was made but the majority of the estate was distributed before the executors were notified of the application.

The deceased left her whole estate to one of her two sons and appointed the favoured son and his wife as her executors. The excluded son issued a family provision application eight days before the time to bring that proceeding expired, namely six months from grant of probate.²

Several days later the excluded son's practitioner notified the executors' practitioner that they "had been instructed to commence a claim on behalf of [their] client" and putting the executors on notice not to distribute the estate.

The executors' practitioner responded 11 days later sending a notice pursuant to s30 of the *Administration and Probate Act 1958* (Vic) (s30 notice) requiring the excluded son to issue proceedings to enforce his claims within three months.

Despite a reminder by the executors' practitioner that the notice would expire in five days and the estate administration would be "progressed" if nothing further was heard in that time, no further correspondence was received. Two days after the expiry of the s30 notice the executors transferred the single major asset of the estate to the sole beneficiary. Just over an hour after the transfer occurred the excluded son's practitioner emailed advising the executors that an originating motion had been filed some months ago.

The relevant question

With only a small amount left in the estate the executors sought summary dismissal of the excluded son's family provision claim, relying on the protection of s99A(3) in the *Administration and Probate Act*. The provision provides protection to any personal representative who has distributed an estate, provided they waited six months from the date of probate and:

- the personal representative had not received notice of an application for a family provision order in respect of the estate; or
- if the personal representative had received a notice of an intention to make an application for a family provision order but in the following three months since that notice had not received a written notice that an application for a family provision order had been made to the Court.

Outcome of the case

The Court held that the letter telling the executors that the excluded son had instructed his practitioner to commence a claim was only a notice of intention to make an application and not a notice of an application. The fact that the letter also said,

"We put you on notice not to distribute any part of the estate until such time as our client's claim is dealt with" did not constitute a notice of an application.

The result was that the excluded son did not notify the executors that an application had been made within the required three months since the initial notice of intention to make the claim. This meant the executors were entitled to the protection under s99A, even though the application had been made within the relevant time. In summary, unless executors are told in writing about an application having been made the protection of s99A applies. The s30 notice was not considered relevant by the Court.

As there was no prospect of claiming any of the assets back from the executors, there was insufficient assets in the estate to warrant the continuation of the application and summary dismissal was ordered.

Risk management lessons

When acting for family provision claimants, practitioners need to:

- understand the consequences of s99A, namely:
 - to stop distribution of an estate for more than three months the executors must be notified in writing that a family provision application has been made
 - notifying executors of an intention to bring an application only stops distribution of the estate for three months
- pay attention to the language used in any notice to the executors so that it is clear whether it is a notice that an application for a family provision order has been made, or a notice that the client intends to make an application
- carefully diarise the relevant time frames and have more than one set of eyes checking the dates
- understand that just notifying of an intention to bring an application for family provision does not entitle the claimant to bring the application if it is outside six months from the date of probate. ■

This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

- [2021] VSC 553.
- S99 *Administration and Probate Act 1958* (Vic).

TIPS

- To stop distribution of an estate for more than three months the executors must be notified in writing that a family provision application has been made.
- Notifying executors of an intention to bring an application only stops distribution of the estate for three months.
- Because the different notices have different consequences, attention needs to be given to the language used in the notice.