# Missing deadlines

## The costly lesson learnt from *Mortimer v Lusink & Ors*

with Christine Smyth

**How one reacts when they realise they have been excluded from a will is a personal matter.**

Many people, acutely aware of the sensitivity usually associated with a loved one passing, will patiently remain in the background for fear of 'upsetting the applecart' or causing additional distress. This can, as was demonstrated in the recent Supreme Court case of *Mortimer v Lusink & Ors* [2017] QSC 119 (*Mortimer*), mean that important deadlines are missed if you are seeking further or better provision of an estate.

Time limits apply for commencing proceedings and limitation periods vary in each jurisdiction. In Queensland, section 41(8) of the *Succession Act 1981* (Qld) sets out that an application for proper maintenance and support must be brought within nine months of the will-maker's death. In *Mortimer*, the court considered the scenario in which the application was brought outside the limitation period – albeit by only nine days.

At first instance, the court refused to grant the applicant an extension. The decision reiterates that time is of the essence and persuading a court to grant an extension to a statutory time limit is a rare and difficult thing. (The case at first instance also demonstrated that a court's power under s41 is a discretionary one and that there is no automatic right for a party to be granted either an extension of time or successful order for further provision.)

The Court of Appeal, however, diverged from this decision as it found that the primary judge failed to inquire whether the appellant's claim was one that was clearly unlikely to succeed or would probably fail. In doing so, the Court of Appeal was of the view that the failure to consider the viability of the appellant's claim caused the primary judge to improperly dismiss the application.

As such, the Court of Appeal set aside the Supreme Court's orders and upheld the appellant's claim to make an application, despite exceeding the limitation period.

The Court of Appeal's reasoning in *Mortimer* demonstrates a pattern which requires that sufficient judicial analysis of whether an application has a reasonable degree of success must occur, in the course of determining whether to uphold an appeal.

We see this also in the decision of *Frastika v Cosgrove as executor of the estate of Russell Walter O'Halloran (Deceased)* [2016] QSC 312, which considered an application to contest brought 63 days after the limitation period. In *Cosgrove,* Justice Boddice considered those factors which might impact on the success or failure of application, including the value of the estate, the relationship duration and relatively short marriage of only eight months and concluded that "the applicant would have difficulty in establishing that the limited provision made for her in the deceased's will was inadequate, having regard to the sizable provision made for her through the binding death benefit nomination".

A large number of estate matters filed in the court relate to applications seeking further and better provision of the estate. The Society's Succession Law Committee has undertaken recent advocacy in this area.

### QLS Succession Law Committee advocacy

The Society's Succession Law Committee has a long history and is charged with reviewing, advocating and consulting with government and judiciary on areas impacting on succession law. In recent months, the committee has provided consultation and feedback in relation to:

- the District Court's draft practice directions in relation to family provision applications, which demonstrated the divergent views of the profession on certain issues. The Society, headed by president Smyth, later met with Chief Judge O'Brien and Judge Dorney alongside members of the Bar Association, to further discuss these issues.
- the current guardianship laws in Queensland, which have been an ongoing area of interest. The committee is now providing feedback in relation to the Guardianship and Administration and Other Legislation Amendment Bill 2016.
- proposed reform to enduring powers of attorney legislation, which reflected on interstate legal aspects, the onus that lies on the practitioner, and liability issues
- meetings with the Public Trustee, regarding the need for a dedicated enquiries officer to respond to practitioner enquiries
- proposed amendments regarding suggested improvements to the court-made wills protocol
- providing feedback in relation to a Queensland Law Reform Comission-led review of the *Trusts Act 1973.*

Additionally, members of the committee regularly meet with the Supreme Court Registry to discuss matters including the number of applications filed, processing times, common requisitions and other notable issues.

The committee welcomes feedback on any practice items or areas of succession law reform. Please contact QLS policy solicitor Vanessa Krulin on (07) 3842 5872 or v.krulin@qls.com.au.

The author expresses her gratitude for the assistance provided by QLS policy solicitor Vanessa Krulin in the prepartion of this column. Christine Smyth is president of Queensland Law Society, a QLS accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, QLS Specialist Accreditation Board, the *Proctor* editorial committee, STEP, and an associate member of the Tax Institute.



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