WHAT'S NEW IN SUCCESSION LAW

The perils of litigating, not mitigating

Buckingham v Buckingham [2020] QSC 230
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By **Christine Smyth**

When it comes to litigating deceased estates, it seems we're a close second to New South Wales,[1] with "1 estate contested per 104,953 persons" annually in Queensland.[2]

Sadly, adult children of the deceased make up the largest cohort of estate litigants,[3] with "enmities and allegiances"[4] fuelling disputes.

Litigation of any kind is costly; however, in estate matters, litigation can be a particularly self-defeating exercise, due to the reductive effect of costs orders on the pool of available estate assets in small estates.

Recognising this as a real and serious concern, our courts have created a number of mechanisms to minimise, dissuade, or redirect litigants to a less costly and, some might argue, less combative approach to resolution. They include:

- Supreme Court of Queensland Practice Direction No.18 of 2018 – Efficient Conduct of Civil Litigation
- Practice Direction No.8 of 2001 – Family Provision Applications
- *Uniform Civil Procedure Rules*, rules 5 and 700A.[5]

Yet, even with these tools, the number of estate matters before the court demonstrate that many deceased estate disputes remain intractable. Where that occurs, our legislature has created other mechanisms, through the operation of various provisions, granting the court power to guide and/or direct estate litigants to find a less costly resolution.

Buckingham v Buckingham [2020] QSC 230 (*Buckingham*) explores the power of the court to direct or guide executors through the application of S96 (1) *Trusts Act 1973* (Qld) and/or s6 *Succession Act 1981* (Qld) in the context of a small estate dispute. His Honour Henry J creatively demonstrates how the court can use its powers to direct quarrelsome family members to find their own pragmatic solution or risk having one imposed on them with attendant costs orders.

Faye Buckingham died on 21 September 2017[6] survived by her six adult children. By her will Faye appointed two of her six children – Janette and Graham[7] – as joint executors of her estate. The estate was not large, worth about $614,756.[8] From the outset the administration of the estate was beset with disharmony. In various combinations, the adult children of the deceased did not get along, including the two joint executors.

At the heart of the estate dispute was the true ownership of a unit at Yorkeys Knob. The unit was purchased in 2002 and registered in the name of one of the deceased's children – James (AKA Jim), however it was bought for $65,000 with money advanced by the deceased and her late husband at their direction.[9] So, the question arose as to whether the unit was held on a resulting trust for the estate, or whether it belonged to Jim? Overarching that question was whether there was a reasonable economic benefit to the estate in pursuing the claim and whether an interim estate distribution ought to be made while the matter remained outstanding?

Janette wished to pursue Jim, Graham did not. This contention resulted in the estate not being advanced.[10] Consequently, two actions were brought before the court. One by Jim and the other by Janette.

"Jim sought to remove Janette and Graham as executors",[11] substituting in Graham as sole executor.[12] Janette brought an application for advice from the court as to the propriety of the estate pursuing Jim for the unit.[13]

At the time of the hearing the unit was worth between $110,000 and $120,000 gross.[14] The unit was subject to a mortgage of $45,549.53 and, if sold, it would be subject to agent's commission of

$9400.[15] Those costs reduced the net value of the unit to between $55,000 and $65,000. There would also be a further reduction in net value on determination of capital gains tax.[16]

Critical to this economic assessment was the question of legal costs. The court received evidence that on a 'best case scenario' the estate would "bear about $6000 costs and a worst case scenario of the estate having to bear about $114,000 costs".[17]

The court observed: "[D]epending on the outcome of the action and costs orders, the estate risks losing proportionately more than it stands to gain. That equation alone suggests a prudent executor would hesitate to pursue such an action without at least first exploring settlement of the dispute."[18] There lay a further issue – the unwillingness of the executors to negotiate/mediate a resolution.

Henry J elected to deal with Janette's s96 *Trusts Act 1973* (Qld) application first. He considered that "aspects of it inform consideration of the application for removal of the executors".[19]

He noted that a key feature of s96 was the requirement that there be "a written statement of facts".[20]

Henry J found there was none.[21] His Honour rejected the submission by Janette's counsel that her affidavit material satisfied that requirement.[22] When directed by counsel to his own decision in *Noftz v Kane*,[23] where an affidavit was relied on, his Honour distinguished it by clarifying there "the facts were readily apparent from the affidavit. They are not readily apparent here. The affidavits here contain conflicting assertions of belief and fact, some of which do not properly identify their factual foundation and some of which are likely assertions of opinion or hearsay rather than direct evidence."[24]

Janette's counsel argued in the alternative that his written submissions provided the requisite statement of facts. Henry J also rejected that submission because counsel's written submissions predated various of the affidavits on which the application relied.[25] His Honour found that, without a clear statement of facts, he could not grant the application under s96 Trusts Act.

However, Henry J noted there was no objection to the statement of facts issue by opposing parties. So he turned his focus to s6 of the *Succession Act* 1981 (Qld) which gave him power (in relation to estates) to "make all such declarations…as may be necessary or convenient".[26]

In applying s6, Henry J affirmed that the question of whether it was proper for the estate to bring the action, "invites the same approach to the merits as would be applied in a s96 Trusts Act application".[27]

In exploring the relevant considerations to which a court must have regard, his Honour affirmed Atkinson J's summary[28] in *Coore v Coore*,[29] cited with approval in *Ban v The Public Trustee of Queensland*.[30] Through paragraph 17 to 63 Henry J examines the evidence in the context of the legal principles. They included the law relating to the presumption of advancement, resulting trusts, and release of equitable rights under the *Property Law Act 1974* (Qld).

Ultimately his Honour concluded that there were too many uncertainties for the court to make the order.

His Honour remonstrated that "(e)xecutors acting reasonably in a case of this kind might be expected to secure legal advice. That occurred. Executors acting reasonably might also be expected to follow such advice. That did not occur."[31]

The court further critiqued, noting the legal advice "was to 'strongly recommend' the pursuit of discussions…in the hope of achieving a financial settlement…This was sound advice…However, it was not in the form of any combined attempt by the executors to achieve such a settlement."[32]

"The pursuit of a financial settlement with Jim, as the legal advice urged, was the estate's most realistic chance of improving its asset pool without putting the existing pool at risk. There appears to be no explanation for the executors' failure to properly explore such a financial settlement other than the polarising influence of their enmities and allegiances."[33]

Notwithstanding the uncertainties in the estate's material, his Honour found Jim's case suffered its own weaknesses and as such the advice for the estate to pursue settlement negotiations was a reasonable action for it to take.[34] Accordingly, the court dismissed Janette's application.

Henry J then turned to Jim's application to remove the Janette and Graham as joint executors and install Graham as sole executor.[35] Citing that such a power "derives respectively from s6 Succession Act and s80 Trusts Act[36] and s52(2) Succession Act".[37] Whilst each provision has its own criteria, the "overriding consideration is the due and proper administration of the estate".[38] Henry J found that there was disharmony amongst all siblings, pre and post-death, with particular "disputes between Janette and Graham since the assumption of the executorship, with apparently little ground ceded by either. The upshot is that there was an abject failure to distribute the estate as soon as may be and Janette and Graham were so at odds with each other that they were together incapable of advancing the administration."[39]

They were particularly at odds over the whether to make an interim distribution while the issue regarding the unit was live.

Henry J found that, while it was acceptable (and in keeping with the rule in *Cherry v Boultbee)*[40] to withhold the interim distribution to Jim[41] when the issue over the unit remained in doubt, it was unclear as to why such a distribution could not have been made to the remaining beneficiaries.

He noted that an interim distribution did eventually take place, but only after his orders in an earlier application.[42] Henry J went on to detail the various complaints between each of the executors as to their failings in the conduct of the estate administration.[43]

Henry J rejected the assertion that "only Janette was responsible for the failure of the joint executorship"[44] and that Graham failed to take an objective approach, engaging in "tit-for-tat allegation(s)".[45] With that Henry J found that the "grant of probate to Graham and Janette should be revoked and letters of administration should issue to an independent professionally administrator".[46]

However, instead of making the orders immediately, Henry J opted to issue the orders, and address the question of costs at a later date.[47] In taking this step his Honour granted the warring executors and quarrelsome family members a reprieve. Henry J stated that he "deliberately selected a date that far ahead in order to allow the siblings one final opportunity to avoid the need for the orders by negotiating a settlement of all their disputes in connection with the estate and its administration…Such a settlement would amply protect the executors in distributing the estate as unanimously agreed without the need for further court supervision."[48]

He considered that their knowledge of his "reasons, the order which is looming and its consequent reduction of their prospective inheritances might prompt an abandonment of blame and an outbreak of pragmatism between the main protagonists".[49]

There are some valuable lessons from this decision for clients and lawyers alike. They are:

- Pay attention to the requirements of a legislative provision when preparing material in support.
- It is one thing to be right, it is another to be economic in the pursuit of your legal rights.
- Executors have a duty to take legal advice and heed that legal advice.
- Joint appointments really do mean commonality of mind, with objectivity and reason prevailing.
- Pursuing your legal rights will not necessarily achieve an immediate result at hearing.
- If clients litigate and don't mitigate, the judge they may aggravate!

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Notes

[1] ***'Estate Contestation in Australia – An Empirical Study of a Year in Case Law'****, White, Tilse, Wilson, Rosenman, Purser and Coe. UNSW Law Journal, Volume 38(3) p890, unswlawjournal.unsw.edu.au/wp-content/uploads/2017/09/38-3-15.pdf.*

[2] *Ibid.*

[3] *Ibid.*

[4] ***Buckingham v Buckingham*** *[2020] QSC 230 at [72] (**Buckingham**).*

[5] *For application of Rule 700A see **Outram v Public Trustee of Queensland** [2020] QSC 159; **Pitt v Fricke** [2019] QDC 193; **Stojanovska v Stojanovski** (No.2) [2019] QDC 198**; Baker v Baker** (No.2) [2019] QDC 140; **Sweaney v Bailie** [2017] QDC 295.*

[6] *At [1].*

[7] *Ibid.*

[8] *At [21].*

[9] *At [30].*

[10] *At [82].*

[11] *At [3].*

[12] *Ibid.*

[13] *At [7].*
[14] *At [26]. As with all estate there were other minor matters in contention – see para [22]-[23].*
[15] *At [25].*
[16] *The amount of which could only be determined on identification of the true ownership of the property.*
[17] *At [25].*
[18] *At [27].*
[19] *At [6].*
[20] *At [8].*
[21] *At [9].*
[22] *Ibid.*
[23] *Above [2015] QSC 372.*
[24] *At [11].*
[25] *Ibid.*
[26] *At [14].*
[27] *At[16].*
[28] *At [17].*
[29] *[2013] QSC 196.*
[30] *[2015] QCA 18.*
[31] *At [66].*
[32] *At [71].*
[33] *At [72].*
[34] *At [73].*
[35] *At [79]-[94].*
[36] *At [79].*
[37] *At[80].*
[38] *At 79 citing* ***Baldwin v Greenland*** *[2207] 1 QdR 117.*
[39] *At [81] – [82].*
[40] *At [85] The rule applies where a person who has a right to share in a fund to which that person owes money; the debtor is barred from receiving an entitlement in the fund until the debt has been paid. A copy of* ***Cherry v. Boulton*** *can be found here: worldlii.org/int/cases/EngR/1839/1099.pdf.*
[41] *At [85] provided sufficient funds remained in the estate to pursue the matter.*
[42] *Ibid.*
[43] *At [86]-[89].*
[44] *At [92].*
[45] *Ibid.*
[46] *Ibid.*
[47] *At [94].*
[48] *Ibid.*
[49] *Ibid.*