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Applications for maintenance under S.91 *Administration & Probate Act* – By when must they be made?

Author: John Searle

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Presented by John Searle
Barrister at Law
Foley’s List

Introduction

It is surprising how many people still die without leaving a will. In circumstances where a deceased leaves no will, that is, he or she dies intestate, the estate of the deceased is dealt with according to the provisions of the Administration and Probate Act 1958 (“the Act”).

Of course, the main attraction in leaving a will is to have control over the distribution of your estate. Most people consider that drawing a will provides total control over the distribution of their estate. They believe that their wishes, as set out in the will are for all intents and purposes set out in stone; they are sacrosanct and no one can seek to alter the provisions of the will.

However, drawing a will does not provide total control over the distribution of the estate of a deceased person as the provisions of the will can be challenged.

There are often cases in which people, who believe they should have benefitted from a will, do not so benefit. It may be a first spouse, an estranged child or a relative, who, having looked after the deceased during many years of prolonged illness considers they have an entitlement to a share of the estate. This will particularly be the case if the carer expended money for the benefit or welfare of the deceased.

In a similar vein, there may be one or more beneficiaries under a will who consider they did not receive adequate provision or, as is often the case believe another beneficiary received too great a provision pursuant to the will. Again, this often occurs in cases involving a second marriage or where there has been a falling out amongst siblings, particularly where one sibling has

enjoyed considerable financial success and the other siblings consider their share under the will should be reduced to reflect that fact. There may have been a falling out between one or more of the children and their parents who nevertheless left an equal share of the estate to all children. In such circumstances, the child or children who continued to find favour with their parents may feel aggrieved when they learn that the disaffiliated child or children still receive an equal benefit under the will.

In circumstances where an aggrieved person seeks further provision out of a will, they may wish to challenge the provisions of the will and, in so doing will rely on the provisions of Part IV of the Act, being the Family Provisions. Those provisions allow a court to assess the will and the manner in which the estate has been divided amongst the named beneficiaries and, in appropriate circumstances, alter the division or even the identity of beneficiaries such that people, not named as beneficiaries in the will can be added to the list of beneficiaries.

Section 91 of the Act provides the Court with the power to make a maintenance order and is reproduced as Annexure 1 to this paper.

The manner in which S.91 has been interpreted by the Courts is beyond the ambit of this paper and so, I will not deal with the issues surrounding applications for maintenance.

Time Limit for Applications

If an application for maintenance is to be made on behalf of a client, the first question to consider is whether there is a time limit placed upon the making of such an application. The answer to this question is found in S.99 of the Act. It is set out in Annexure 2 below.

Put simply, S.99 says that any such application must be made within **6 months of the grant of probate or, such extended period as the court may allow.**

However, the application must be made **before the final distribution of the estate and, no extension will be granted in respect to any part of the estate that has been distributed**.

So, assuming the 6 month limitation period has expired when you receive instructions from your client, what can be done?

If the estate has been **finally** distributed in full, the short answer is nothing. If however, the estate has not yet been distributed or not yet finally distributed in full, then an application to extend the time may still be made either in respect of the whole estate or that part that has not been finally distributed.

So, what will a court look at in determining an application under S.99 for an extension of time in which to bring an application under S.91?

Applicable Principles – re Extension of Time

The first thing to recognise is that a wide discretion is given to the Court in determining applications for extensions of time. The discretion must of course be exercised judicially, but the legislation does not specify any criterion to be considered in the exercise of the discretion. In seeking the exercise of the discretion, the applicant bears the onus of proof to show why the discretion should be exercised in their favour.

Having regard to the provisions of S.99 of the Act, the discretion cannot be exercised in favour of the applicant where there has been a final distribution of the estate. Furthermore, if there has been a partial distribution of the estate, that part of the estate that has been distributed cannot be disturbed as the rights of the beneficiaries have become conclusive and indefeasible.

What constitutes a final distribution?

It had previously been the position that the estate was finally distributed when the executors had got in all the estate, completed their executorial duties and consented to the dispositions of the will taking effect even though, from that time on they may still be acting as trustees under the will.

However, the High Court decision of ***Easterbrook v Young*** **(1977) 136 CLR 308** held that the previously followed authorities on this point were wrong. That decision, at pp 316-317 held that "…the actual distribution of the estate, its removal from the hands or name of the personal representative and its placement in the hands or name of the beneficiary …renders the estate finally distributed."

The cases that have considered S.99 have developed the following list of matters which the Court should take into account when considering whether or not to extend the time for an application under S.91 of the Act:

(a) the length of the delay and whether the applicant has a satisfactory explanation for the delay;

(b) the prospects of success of the claim by the applicant for provision, or additional provision, out of the estate;

(c) whether the granting of the application would cause any prejudice to the estate or to the beneficiaries; and,

(d) the overriding need to ensure justice between the parties.

The relevant principles to be applied are set out in the following cases:

Groser v Equity Trustees Ltd **[2007] VSC 27**
Sheppard v Heathcote (No 3) **[2010] VSC 190**
Corbett v State Trustees Limited **[2010]) VSC 481**
Stanley v State Trustees Limited **[2012] VSC 24**

Bennett v Pettitt **[2012] VSC 234**

Delay

Even where the period of delay is short, the applicant will still need to establish he/she has a satisfactory explanation for the delay. In this regard, attention will need to be given as to when the applicant learned of the death of the deceased, when the applicant learned of the existence and provisions of the will, about their legacy, or lack thereof under the will, when the applicant first heard that probate had been sought or granted, when the applicant first sought or received legal advice, whether that advice covered time limits, when the applicant first ascertained they had a right to challenge the will, when the applicant first heard about the time limits and any other factors relevant to explain their delay.

Clearly, the shorter the period of time that has elapsed following the expiration of the 6 month time period, the more easily the court is likely to be persuaded that an extension of time should be granted. Nevertheless, an adequate explanation of the delay must be provided.

Prospects of success

The next and undoubtedly the most critical issue the Court will consider is whether there are any prospects of success of the proposed claim under S.91 of the Act by the applicant. The Court must be satisfied that the proposed claim is not hopeless. However, it will assist greatly if the court can be shown that the claim is in fact meritorious. If the court concludes that the proposed claim is in fact hopeless, there is no prospect of having the time limit extended.

Prejudice

The last point to be considered in the application for extension of time is prejudice which is a weighty factor in the Court's consideration. This is prejudice to the defendant(s)/beneficiaries which may be looked at in terms of

the prejudice that may fall upon some of the beneficiaries where part of the estate has already been distributed. Consideration will also be given to the fact that distribution of the estate will be deferred pending determination or resolution of the claim.

See : Groser's case – para 28

Ultimately, the period of delay and reason for it do not carry much weight in the absence of real prejudice and in the face of a strong proposed claim.

See : Groser's case – para 37

Conclusion

If a client approaches you and wants to challenge a will, you will need to act promptly in obtaining instructions and ascertain if the relevant time limit has expired. This will involve obtaining a copy of, or at least the relevant details in relation to the grant of probate, if any.

If probate has been granted, it will be necessary to determine what part or parts of the estate have been finally distributed as these parts will be "untouchable".

If it is ascertained that the 6 month time period has elapsed but the full estate has not been finally distributed, it may be worthwhile pursuing an application to extend time under S.99 of the Act.

In such circumstances it will be necessary to:

- ascertain why your client did nothing for so long; it may be that he/she did not know the deceased had died, had been indisposed, was mislead as to the contents of the will;
- obtain a copy of the will and confirm your instructions if not already done;

- put the executors on notice that an application is to be made;
- ensure you can draw a comprehensive affidavit on behalf of your client covering all of the relevant factors that a Court will need to consider;
- issue the application promptly;
- prepare submissions to assist the court on the return of the application.

The application itself is made by way of an Originating Motion, supported by an affidavit. Typically, the originating motion will seek orders for the appropriate relief or remedy pursuant to Part IV of the *Administration and Probate Act* 1958 being:

1. An order pursuant to S.99 of the *Administration and Probate Act* 1958 that an extension of time be granted.

2. An order that such provision for the Applicant's proper maintenance and support as the Court thinks fit be made out of the estate of the deceased.

3. Costs.

4. Such further or other order as the Court considers just and equitable.

Finally, in answer to the initial question posed above, whilst the 6 month time limit within which an application can be made under S.91 of the Act can be extended by any time period, it is always wise to act as quickly as possible.

Annexure 1

***Administration and Probate Act* 1958 - SECT 91**

Power of the Court to make maintenance order

91. Power of the Court to make maintenance order

(1) Despite anything in this Act to the contrary, the Court may order that provision be made out of the estate of a deceased person for the proper maintenance and support of a person for whom the deceased had responsibility to make provision.

(2) The Court must not make an order under subsection (1) in favour of a person unless-

(a) that person has applied for the order; or

(b) another person has applied for the order on behalf of that person.

(3) The Court must not make an order under subsection (1) in favour of a person unless the Court is of the opinion that the distribution of the estate of the deceased person effected by-

(a) his or her will (if any); or

(b) the operation of the provisions of Part I, Division 6; or

(c) both the will and the operation of the provisions-

does not make adequate provision for the proper maintenance and support of the person.

(4) The Court in determining-

(a) whether or not the deceased had responsibility to make provision for a person; and

(b) whether or not the distribution of the estate of the deceased person as effected by-

(i) the deceased's will; or

(ii) the operation of the provisions of Part I, Division 6; or

(iii) both the will and the operation of the provisions- makes adequate provision for the proper maintenance and support of the person; and

(c) the amount of provision (if any) which the Court may order for the person; and

(d) any other matter related to an application for an order under subsection (1)-

must have regard to-

(e) any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship;

(f) any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;

(g) the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject;

(h) the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any

beneficiary of the estate at the time of the hearing and for the foreseeable future;

(i) any physical, mental or intellectual disability of any applicant or any beneficiary of the estate;

(j) the age of the applicant;

(k) any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased or the family of the deceased;

(l) any benefits previously given by the deceased person to any applicant or to any beneficiary;

(m)whether the applicant was being maintained by the deceased person before that person's death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased had assumed that responsibility;

(n) the liability of any other person to maintain the applicant;

(o) the character and conduct of the applicant or any other person;

(p) any other matter the Court considers relevant.

Annexure 2

Administration and Probate Act 1958 - SECT 99

Time within which application may be made

99. Time within which application may be made

No application shall be heard by the Court at the instance of a party claiming the benefit of this Part unless the application is made within six months after the date of the grant of probate of the will or of letters of administration (as the case may be): Provided that the time for making an application may be extended for a further period by the Court after hearing such of the parties affected as the Court thinks necessary, and this power shall extend to cases where the time for applying has already expired but in all such cases the application for extension shall be made before the final distribution of the estate and no distribution of any part of the estate made prior to the application shall be disturbed by reason of the application or of any order made thereon.

Provided further that the time for making an application under this Part shall be extended by a period equal to the period between the commencement of proceedings in an application under Part V and the making of an order by the Court granting or dismissing the application.