

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
TRUSTS, EQUITY AND PROBATE LIST

Not Restricted

S ECI 2022 02451

IN THE MATTER of section 15 of the *Administration and Probate Act 1958*

-and-

IN THE MATTER of the will and estate of MATTHEW JOSEPH SHEEDY, deceased

ANNA JEDRZEJEWSKA

Plaintiff

v

DANIEL JAMES SHEEDY

Defendant

JUDGE: Moore J
WHERE HELD: Melbourne
DATE OF HEARING: 10 and 16 August 2023
DATE OF JUDGMENT: 30 August 2023
CASE MAY BE CITED AS: Jedrzejewska v Sheedy
MEDIUM NEUTRAL CITATION: [2023] VSC 511

WILLS AND ESTATES – Application for passing over defendant executor – Where defendant neglected executorial duties – Where defendant is unfit to act as executor – Application granted - *Administration and Probate Act 1958*, s 15 – *Titterton v Oates* (1998) 143 FLR 467; *Skaftouros v Dimos* [2002] VSC 198; *Re Estate of Crane* (2005) 93 SASR 198; *Re Flavel*; *Application by Lipshut* [2018] VSC 228; *O'Halloran v Coffey (No 2)* [2023] VSC 51.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M Latham	Scott Legal
For the Defendant	Mrs A Sheedy ¹	

¹ Soon after the commencement of the trial, the Court granted leave to Mrs Antonette Sheedy to appear on behalf of the defendant, who is her husband. Mrs Sheedy is not a legal practitioner.

HIS HONOUR:

1 The plaintiff was the domestic partner of Matthew Sheedy who died on 14 November 2018. The deceased left a will dated 21 August 2018 in which he appointed his brother, the defendant, as executor of his estate. By his will the deceased left five legacies to his children and a unit in Linnet Street, Altona (the **property**), together with the residue of his estate, to the plaintiff. The inventory filed in respect of the deceased's estate records a net value of approximately \$972,000.

2 Although the defendant advertised an intention to apply for probate of the deceased's will on 29 July 2020, an application for a grant of probate was not filed until 2 December 2021, more than three years after the deceased's death.

3 The plaintiff sought an order that the defendant be passed over as executor of the deceased's estate because:

- (a) he has neglected his duties as executor;
- (b) he is not fit to serve in the office of executor because of ill health; and
- (c) he is not competent to take probate.

4 The plaintiff also lodged a caveat in respect of the defendant's application for a grant of probate on 15 March 2022 (the **probate proceeding**). The ground of objection was that the defendant should be passed over as executor of the deceased's estate.

5 In support of her passing over application, the plaintiff relied upon affidavits by her instructing solicitor dated 30 June 2022, 18 November 2022, and 31 January 2023. The plaintiff also relied upon oral evidence given by Peter Johnson who was subpoenaed to give evidence. Mr Johnson is a solicitor who was acting on behalf of the defendant in this proceeding and in the probate proceeding until he filed a notice of ceasing to act on 19 April 2023.

6 The defendant, who opposed the application for him to be passed over, gave oral evidence and relied on an affidavit by him dated 10 August 2023 and an affidavit in

substantially similar terms made on the same date by his wife Antonette Sheedy (**Mrs Sheedy**).

7 On 16 August 2023 I granted the plaintiff's application and made an order in the following terms:²

Pursuant to s 15 of the *Administration and Probate Act 1958*, and the inherent jurisdiction of the Court, the defendant, Daniel James Sheedy, be passed over as executor of the will and estate of Matthew Joseph Sheedy dated 21 August 2018.

These are my reasons for judgment in so ordering.

Power to pass over an executor

8 The Court has both inherent power and power under s 15 of the *Administration and Probate Act 1958* to pass over an executor.³ The exercise of the power is, however, to be informed by an appreciation of the limited nature of the Court's jurisdiction in that, in general, a person named as executor by a testator is entitled to a grant of probate. The Court will not readily pass over a named executor.⁴

9 The jurisdiction to pass over an executor is to be exercised having regard to the due and proper administration of the estate and the interests of the parties beneficially entitled to it.⁵ The jurisdiction has been exercised in a range of circumstances, including those of the type relied upon by the plaintiff in this matter set out in [3] above.⁶

Neglect of duties

10 The plaintiff submitted that the defendant had neglected his duties as executor of the deceased's estate in the following respects:

- (a) by his unreasonable delay in applying for probate;
- (b) by failing to respond to requisitions issued by the Registrar of Probates;

² In the probate proceeding I also ordered that the caveat filed by the plaintiff be dismissed.

³ See *O'Halloran v Coffey (No 2)* [2023] VSC 51 [52]-[72] (*O'Halloran v Coffey (No 2)*).

⁴ *Ibid* [54].

⁵ *Ibid* [100]-[105].

⁶ *O'Halloran v Coffey (No 2)* (n 2); *Re Estate of Crane* (2005) 93 SASR 198.

- (c) by not responding to several requests for information about the estate from the plaintiff's solicitor;
- (d) by not taking steps to pay the debts of the estate with reasonable diligence, or at all; and
- (e) by not cooperating with the plaintiff in attempting to arrange a mediation, by not attending a recent directions hearing in the proceeding and by not filing any affidavits in this proceeding.

Delay

- 11 As I have noted, the defendant did not lodge an application for probate until nearly three years after the deceased's death.
- 12 Although the defendant gave evidence that he could not recall when Mr Johnson was engaged, he also gave evidence that he considered that Mr Johnson was engaged from the date of the deceased's death because the deceased had appointed him and he had been involved in finalising the deceased's affairs before his death. Mr Johnson estimated that he was engaged to act on behalf of the deceased's estate about six months after the deceased died.
- 13 On its face, having regard to the prima facie general position indicated by the concept of the executor's year, a delay of three years in the making of an application for a grant is a very substantial delay which, in the absence of good explanation, is capable of amounting to a neglect of executorial duties which may warrant an executor being passed over.
- 14 The defendant advanced a number of reasons said to explain the delay in the filing of the application for a grant.
- 15 First, he referred to the Covid-19 pandemic which he said accounted for at least 12 months of the delay. I do not accept this explanation. The deceased died more than 12 months before the pandemic began. Furthermore, while acknowledging the very disruptive effect of the pandemic on many aspects of life, I do not accept the general

assertion that, in and of itself, the pandemic caused an unavoidable delay of 12 months. It may be noted that digital procedures to lodge applications for grants of probate online have been operational in the Court since about 1 July 2020.

16 The second reason for the delay was said to be difficulties in determining the extent of the deceased's assets. The defendant referred in particular to problems and delays in dealing with disputed ownership claims over railway antiques and memorabilia. He estimates that these controversies absorbed about six months of time; this is consistent with Mr Johnson's evidence. The difficulty with this posited explanation is that this controversy about ownership of chattels - particularly when it became apparent that it was not able to be resolved reasonably quickly - should not have prevented an application for a grant being lodged.

17 The third reason for delay was attributed to the difficulty in obtaining a hospital report on the deceased's testamentary capacity as required by a requisition issued by the Registrar of Probates issued on 9 December 2021. This requisition remains outstanding and is a matter to which I will return later in these reasons for judgment.

18 The fourth reason for delay concerned injuries to the defendant's shoulders and shoulder surgery he underwent in September 2022. I accept that the defendant, whose age is not established on the evidence, but who appeared to be around 70 years of age, has experienced (and continues to experience) significant pain in both shoulders as a result of car accidents which occurred in 2017 and 2018. These matters, as well as the shoulder surgery he has already undergone, have affected his capacity to make application for a grant in a timely way.

19 However, I do not accept that these difficulties, to which I will later return, provide a justification for the delay in applying for a grant, either alone or in conjunction with the other matters to which I have referred above. Despite the defendant's health issues, Mr Johnson's engagement on behalf of the deceased's estate should have allowed an application to be made in a timely way.

- 20 This then brings into focus the fifth and most significant matter which the defendant attributes for the delay: the alleged failures of Mr Johnson. The defendant referred to a number of alleged serious failures by his former solicitor, including failures to communicate and to provide advice in a clear and timely way, failures to inform him about legal proceedings and to seek instructions, appearances by Mr Johnson in this Court without instructions, and failures by Mr Johnson to return documents despite requests. It was clear from the defendant's evidence that he was deeply frustrated with Mr Johnson's conduct, both in relation to this proceeding and in the probate application. He has lodged a complaint with the Victorian Legal Services Board and Commissioner about various alleged breaches by Mr Johnson of his professional obligations.
- 21 Significantly, Mr Johnson accepted in his evidence that he, and not the defendant, was responsible for the delay in the filing of an application for a grant. Beyond the period of about six months spent dealing with the dispute about chattel ownership, Mr Johnson frankly conceded that he did not have a satisfactory explanation for the remaining period of delay. He attributed his failure to apply for a grant in a timely way to busyness of work and because he 'wasn't well a couple of times'.
- 22 Mr Johnson also confirmed the defendant's evidence that the defendant was not happy about the delays and complained to him about them. His evidence was that, from at least April 2022, the defendant raised with him, about every month, his concerns and dissatisfactions about the delays. Notes of phone calls between the defendant and Mr Johnson, prepared by Mrs Sheedy, suggest that the defendant began regularly making enquiries about the progress of the application for a grant from about mid-2020.
- 23 I will return to the significance of these admitted failures by Mr Johnson later in these reasons. Subject to that matter, I otherwise consider that the defendant's delay in applying for a grant was unduly long and not adequately explained or justified by the various reasons advanced by him, whether viewed collectively or in isolation.

Failure to respond to requisitions

24 On 9 December 2021, the Registrar of Probates issued a requisition to the defendant seeking, amongst other things:

- (a) medical evidence of the deceased's testamentary capacity;
- (b) an affidavit of due execution; and
- (c) an affidavit providing an explanation for the delay in seeking probate.

25 On 5 October 2022, nearly ten months after the requisition was issued, the defendant filed an affidavit outlining his explanation for the delay in seeking probate and two affidavits of due execution. Those affidavits did not, however, sufficiently respond to the requisition by providing an explanation for the poor quality of the deceased's signature on the will and clarification as to whether the will was read over to the deceased prior to its execution. A further requisition was issued on 6 October 2022 outlining the defects in the affidavits of due execution and noting that items from the 9 December 2021 requisition remained outstanding. That requisition remains unanswered.

26 Although the evidence indicates that Mr Johnson informed the defendant about these requests in about March 2022, he accepted responsibility for the failure to attend to them, either at all, or in a prompt manner. His evidence was that it was because of his 'neglect'. It is convenient to return to this issue in the context of examining the significance which may attach to the fact that practical responsibility for this failure of duty may be seen as being with an agent appointed by an executor, rather than the executor themselves. However, subject to that matter, the defendant's failure to respond to the Registrar's requisitions in a timely way, or at all, is a serious failure to discharge his executorial duty.

Failures to respond to requests for information about the deceased's estate

27 Between August 2021 and April 2022, the plaintiff's solicitor made many phone calls and sent numerous emails to Mr Johnson about the deceased's estate, which communications largely went unanswered. Mr Johnson's evidence was that he

'occasionally' responded to these communications, but did not do so all of the time because he was busy with other matters.

28 Subject to further considering the significance which may attach to these failures to respond to communications about the deceased's estate being failures which, in a practical sense, were committed by the defendant's agent, it is otherwise clear that the defendant thereby failed in his duties as an executor. An executor has a duty to communicate with the beneficiaries of a deceased's estate and respond to reasonable inquiries for information about the assets and accounts of the estate.⁷

Failure to pay the debts of the deceased's estate

29 The next ground upon which the plaintiff contends that the defendant has neglected his duties as an executor is because he has not paid the debts of the estate with reasonable diligence or at all. One of the duties of an executor is to pay the debts of the estate with due diligence.⁸

30 The evidence establishes that council rates in respect of the property have not been paid. As a consequence, debts and interest have accrued to an amount in excess of \$7,000.00.

31 The defendant's position appears to be that he only became aware after Mr Johnson ceased acting in April 2023 that these charges in relation to the property had been unpaid.

32 The difficulty for the defendant is that nearly four months has elapsed since he became aware of these debts and that they remain unpaid. Although I accept the defendant's evidence that he has taken various practical steps to arrange payment – such as speaking with council officers and representatives of the bank – the fact remains that those steps have been ineffective. The defendant has been unable to attend to a straightforward task in respect of an important matter concerning the deceased's estate in circumstances where the hearing in this proceeding was imminent. As result,

⁷ *Skaftouros v Dimos* [2002] VSC 198, [14] ('*Skaftouros*'); *Titterton v Oates* (1998) 143 FLR 467, 478.

⁸ *Skaftouros* (n 7) [10].

this is a matter which supports a finding of neglect by the defendant in the discharge of his executorial duties.

Failures in respect of conduct of this proceeding

33 The last matter relied upon by the plaintiff in relation to the defendant's alleged neglect of his duties is the proposition that he has failed to cooperate with the plaintiff in attempts to arrange a mediation, did not attend a directions hearing and did not file any affidavits pursuant to the orders of the Court. One of the duties of an executor is to respond to claims by acting properly and reasonably in the conduct of litigation and in compromising proceedings if appropriate.⁹ The plaintiff submits that the defendant has been recalcitrant in the conduct of the proceeding, by failing to agree to arrangements of a conventional type for the conduct of a mediation as provided by orders of the Court, and by failing to communicate with the plaintiff.

34 Mr Johnson frankly accepted in his evidence that he did not take any steps before 18 November 2022 to engage with the plaintiff's solicitor to arrange a mediation, despite the fact that the Court made orders in September 2022 that the proceeding be referred to mediation to be concluded by 18 November 2022. The time for the parties to organise a mediation was later extended more than once to 7 April 2023. Mr Johnson also admitted that the mediation did not occur in this extended timeframe because he did not respond to any of the five or six emails sent by the plaintiff's solicitor for the purposes of making the necessary arrangements. Mr Johnson did not inform the defendant about the orders of the Court requiring the parties to arrange a mediation and it would appear he also did not inform the defendant about the communications received from the plaintiff's solicitors which went unanswered.

35 Mr Johnson attributed these failures to having been ill at different times which 'got on top of him'. Although he claimed to have had three separate 'significant incidents' between September 2022 and February 2023, he did not inform the defendant had he had been ill.

⁹ *Re Flavel; Application by Lipshut* [2018] VSC 228, [35] – [36].

36 Mr Johnson also admitted that he did not inform the defendant about a directions hearings in the proceeding.

37 In relation to the fact that the defendant did not file any affidavit material in this proceeding while Mr Johnson was acting for him (in circumstances where orders had been made for material to be filed), Mr Johnson's explanation was that this was because he 'wasn't dealing with the matter properly' because of stress and health issues.

38 The above failures, if committed by the person appointed as the executor of a deceased's estate, are sufficiently serious and sustained to warrant the executor being passed over. I consider below whether this conclusion is affected by the fact that practical responsibility for what has occurred lies with Mr Johnson as the defendant's agent.

Significance of representative neglect

39 In his evidence to the Court, Mr Johnson has admitted to conduct which, globally, amounts to a serious dereliction of his professional duties to his client. Furthermore, he failed to properly discharge his duties to the Court by his inaction in making arrangements for the conduct of a mediation of this proceeding which the Court had ordered to occur.

40 The question is whether these failures excuse the defendant from responsibility as executor of the deceased's estate for Mr Johnson's acts and omissions which otherwise collectively constitute a serious neglect of executorial duty.

41 In my opinion, the question is to be answered in the negative.

42 The starting point is to recognise that the office of executor is a personal one and its functions are ordinarily unable to be delegated. Although it is not uncommon for an executor to engage an agent, such as a solicitor, for advice and assistance in carrying out their functions and duties, responsibility for the discharge of their executorial

duties remains with the deceased's legal personal representative, not the agent. Further, as stated by Professor Dal Pont in the *Law of Executors and Administrators*:¹⁰

...the law requires personal representatives to exercise care in selecting agents who are suitable and competent in the area of appointment, and then supervising them in the work undertaken.

...

... personal representatives who legitimately engage an agent to inform their decision-making cannot defer entirely to the agent but must exercise their own judgment.

The same points are made by the authors of *Jacobs' Law of Trust in Australia* who, in their distillation of the key principles since the old decision in *Ex parte Belchier*,¹¹ identify the additional principle that '[t]rustees had to be diligent in seeing that the duty delegated to the agent had been duly performed'.¹²

43 Mr Johnson has demonstrated himself to be unsuitable, or lacking in competence, in respect of his engagement as an agent of the defendant to obtain a grant of probate in respect of the deceased's will. That, however, is a conclusion which emerges with the benefit of hindsight; there is no basis to suggest that the defendant ought reasonably have been aware of Mr Johnson's unsuitability at the time he was engaged.

44 However, Mr Johnson's unsuitability for the task he was engaged to perform, or his lack of competency in undertaking it, was something which ought reasonably have been apparent to the defendant by at least some time in 2021. By no later than mid-2020, about 18 months after the deceased's death, the defendant received the first of many assurances from Mr Johnson that an application for a grant would be lodged within a week or 10 days. Mr Johnson's failure to deliver on that assurance, and its continued hollow re-statement, his lack of responsiveness to the defendant's communications and the plethora of dubious excuses he proffered for the resulting delays left the defendant increasingly agitated and frustrated. Mr Johnson's evidence was that the defendant began to complain to him about the delays from around April

¹⁰ G E Dal Pont, *Law of Executors and Administrators*, (LexisNexis, 2022) [12.33]-[12.34], citations omitted.

¹¹ (1754) 27 ER 144.

¹² Heydon and Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Australia, 8th ed, 2016) [17.23].

2022. By that time, the defendant was also aware of requisitions issued by the Registrar of Probates which remained unanswered.

45 Despite being well aware of these delays and Mr Johnson's repeated failures to perform the task he was engaged to undertake, the defendant did not consult with another solicitor about their possible engagement in lieu of Mr Johnson until about October 2022. This was unduly late. A reasonably prudent executor in the defendant's position armed with the defendant's knowledge about Mr Johnson's failures would not have delayed acting for such a prolonged period of time. I am accordingly satisfied that the defendant failed to exercise due care in supervising the work Mr Johnson was charged to undertake and ensuring that the work he was engaged to undertake was duly performed.

46 For all of the above reasons I consider that the defendant has neglected his duties as executor of the deceased's estate in important respects so as to warrant him being passed over as executor of the deceased's estate.

Other grounds for defendant to be passed over

47 The plaintiff submitted that the defendant was not fit to serve as executor on account of his ill health.

48 I accept this submission. A number of times in the course of the hearing the defendant informed the Court that he was in substantial pain owing to his shoulder injuries and that his capacity to appear in the hearing was adversely affected by the medication he was taking, as well as a lack of sleep. The defendant also referred to the poor state of his memory generally and in relation to the matters raised in this proceeding. Although he declined to seek an adjournment of the proceeding, in the course of the first day of the hearing, the defendant made application for his wife, Mrs Sheedy, to appear on his behalf on the basis that the pain he felt in his shoulders meant he was unable to continue representing himself and that Mrs Sheedy, being his wife of some 51 years, was familiar with the matters before the Court. In the unusual circumstances of the case, I granted the application which was not opposed. I accept the genuineness

of the various complaints made by the defendant about his medical condition and his capacity to participate in the proceeding.

49 There remain a number of outstanding matters in the administration of the deceased's estate: the requisitions issued by the Registrar of Probates remain outstanding, the assets of the estate need to be called in and the liabilities paid. Administering the estate, which has been unduly delayed, will require focus and diligence. I am satisfied that the defendant does not presently have that capacity due to his medical condition. Regrettably, it is unlikely that his condition will improve, at least in the short term. The defendant informed the Court that, because he required further surgery on one of his shoulders, he expected his condition to worsen over the coming months. It is therefore likely that the difficulties which have hampered the defendant in his attempts to administer the deceased's estate to date and those which have been evident in the course of the hearing will continue to impede his capacity to efficiently administer the estate.

50 I am accordingly satisfied that the defendant is not fit to serve as executor because of his ill health.

51 In light of this conclusion and my finding that the defendant has neglected his duties, it is unnecessary to consider whether the defendant should also be passed over because the defendant is not competent to take probate.

Conclusion

52 The plaintiff has established two grounds upon which the defendant should be passed over: he has neglected his executorial duties and he is unfit to act as executor.

53 In considering the exercise of the Court's power to pass over an executor, I am mindful that the jurisdiction is a limited one and that special circumstances must exist to warrant such an order being made. The principal reasons advanced by the defendant as to why he should not be passed over were that he had always acted in good faith and that he had relied upon and trusted Mr Johnson. I have already dealt at length with the latter proposition. As to the first, I readily accept and take into account that

the defendant has at all times acted honourably and in good faith in attempting to fulfil the responsibility vested in him by his brother. This is not a case where the failures of duty might be seen to reflect the wrongful advancement by an executor of their own interests over the interests of the beneficiaries of an estate, or where an executor's conduct has been compromised because of a conflict of interest.

54 Although the defendant has at all times acted in good faith, that is not the relevant inquiry in determining whether to exercise the Court's limited jurisdiction to pass over an executor. Whether the power should be exercised is to be determined by reference to the due and proper administration of the deceased estate and the interests of the beneficiaries. Having regard to those considerations, in the circumstances of this case, including in particular the outstanding matters to be addressed before any grant may be made, the defendant's neglect of duty and his unfitness to act properly justify him in being passed over.

55 Both parties informed the Court that they sought orders that their costs of this proceeding and of the probate proceeding be paid by Mr Johnson. I will make orders requiring Mr Johnson to attend before the Court to afford him an opportunity to be heard as to whether he should be ordered to pay all or part of the parties' costs in this proceeding and in the probate proceeding.
