



Précis Paper

Claims Against an Estate

Allan Blank and Alun Hill discuss a recent case in which family provision and contractual claims were made against a deceased estate.

Discussion Includes

- What is a de facto relationship for the purposes of family provision applications?
- What is a close personal relationship for the purposes of family provision applications?
- When will statements made between persons in a close relationship be contractually binding?
- When will such statements found an estoppel?
- What principles of costs apply in family provision type cases?
- Are Calderbank offers and offers of compromise under the court rules underutilised in these types of cases?

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Claims Against an Estate

1. In this edition of BenchTV, Allan Blank (Barrister) and Alun Hill (Barrister) present on the NSW Supreme Court's (Slattery J) decision in *Sedgwick v Varzonek* [2015] NSWSC 1275 which involved the plaintiff making several claims in contract, estoppel and under the *Succession Act 2006* (NSW) following the death of a woman with whom he had had a long-term relationship. Mr Blank acted for the successful plaintiff, Mr Sedgwick, in the Supreme Court.

Facts Giving Rise to the Claims

2. Mr Sedgwick had a relationship for 9 years with the deceased, Ms Reis. Within a month of their relationship beginning in 2002, the deceased killed her husband. Mr Sedgwick, a frugal pensioner, was able to provide \$2000 for her defence. From 2002-2007, Ms Reis was either incarcerated or hospitalized in mental health facilities, with Mr Sedgwick in regular attendance and often providing small amounts of money to her. At [49], Slattery J notes that Mr Sedgwick was Ms Reis' "necessary support gap during this period".
3. In July 2004, Ms Reis fell from a balcony at Westmead Hospital and suffered severe spinal injuries resulting in paraplegia and traumatic brain damage. Slattery J notes that Mr Sedgwick was "the only non-professional person then in Marlene's life who was prepared and able to provide continuous support to her" at [55].
4. In June 2005, Ms Reis was found not guilty of murdering her husband by reason of mental illness.
5. In August 2005, she initiates personal injury litigation in relation to her fall, with Mr Sedgwick providing the driving force.
6. At about that time there is a conversation between them where she says at [63], "If I get the money, you are coming to live with me, (Mr Sedgwick). I want to buy a home that is wheelchair accessible and has two bedrooms and two bathrooms so we can live together". He says that he then said to her, "If you get no money from your claim then you can come and live with me. We will make a plan somehow to be together". Similar conversations are alleged to have occurred in 2007.
7. During 2008 and 2009, the tenor of the conversations changed with Ms Reis supposedly stating she will give Mr Sedgwick \$300,000 from her personal injury litigation with the number being revised down to \$200,000 because Ms Reis wanted to provide financial support to her mother.

8. Mediation takes place in 2011 in relation to the personal injury matter in which an agreement is reached to pay the deceased \$1.6 million. Shortly after she makes her will, nominating her friend Mrs Varzonek as the executrix, for whom she leaves a 2% commission. The residue is left to her mother and sister. Within a few weeks she takes her own life with nothing left to Mr Sedgwick, despite the considerable amount of gratuitous care he provided and the promise of a house and money. This formed the basis of the plaintiff's claims.

The Succession Act Claims

9. The plaintiff sought an order for financial provision out of the deceased's estate under s 57 of the *Succession Act 2006* (NSW). He claimed he was an "eligible person" under the Act as her "de facto partner" or because they were in a "close personal relation" at the time of her death. Section 3(3) of the *Succession Act* and s 21C of the *Interpretation Act 1987* (NSW) require that the plaintiff had lived with the deceased under either basis, which they had not. The plaintiff alleged that their circumstances constituted an exceptional case, submitting that there was no practical opportunity from the time they met up until the time of her death where it would have been possible to have lived together given her incarceration and hospitalization. His Honour also accepted that they did discuss living together once her personal injury claim was settled. Notwithstanding these submissions, and although Slattery J found they had a "close relationship" at [37], their relationship at the time of her death had largely subsided. His Honour noted that following 2009 they made no attempts to live together, they had no children, and Ms Reis had been in an intimate relationship with another man, Mr Cave, for the last few years of her life. Accordingly, the *Succession Act* claim failed because Mr Sedgwick was adjudged to not be an "eligible person".

The Contract, Estoppel and Restitution Claims

10. The plaintiff also plead cases in contract and estoppel arising out of statements made by the deceased about their eventually living together and about his receiving \$200,000 from the settlement of her litigation.
11. Slattery J accepted Mr Sedgwick's claims that these conversations did occur but clearly distinguished between the two groups of statements. His Honour stated that the statements made about living together at [228] were "discussions between a couple speaking affectionately to one another about a possible future together. They were discussions in an entirely domestic context that were not intended to lead to contractual relations". Conversely, in relation to the statements about money, his Honour concluded at [135] that "these two exchanges were not the dreamy conversations of a couple speculating about their future. There was something more commercial about the plaintiff raising this subject at this time. In my view the fact that Richard Sedgwick initiated the first of these conversations,

as he says he did, indicates that, quite apart from the motivation from his relationship with Marlene, by 2008-2009 he wanted to ensure some concrete financial reward from his efforts furthering the litigation on her behalf." Nevertheless, at [229] Slattery J found against the plaintiff on the contract claims even in relation to these latter statements because "exactly what Mr Sedgwick was going to do in exchange for the \$200,000 was ill-defined and not capable in my view of comprising a contractual promise on his part". In other words, consideration was not established on his part.

12. This analysis did not preclude an equitable estoppel arising from the same statements. In fact, Slattery J concluded that estoppel was made out with respect to the payment of \$200,000. Whilst the first group of statements about living together was "never intended to be relied upon nor (was) relied upon by the plaintiff" (at [232]), the plaintiff was induced to hold, and did hold, the assumption that he would receive \$200,000 by the deceased's statements, and acting in reliance upon that assumption he continued to attend on Ms Reis and assisted her with her litigation (at [234]). The defendant contended that Mr Sedgwick suffered no detriment in that he would have "continued in any event to devote himself to Marlene's welfare and to her litigation had she not made her statement about the \$200,000" at [235]. However, Slattery J rejected this argument, emphasising how the relationship had changed from 2009, as evidenced in the changed tone of their conversations in directly raising the subject of the proceeds. Thus the plaintiff's claim for the \$200,000 was successful in estoppel.
13. The plaintiff also made a claim in restitution on an unjust enrichment basis. The claim was for the gratuitous services he provided the deceased. Slattery J declined to decide the issue of restitution in light of the plaintiff's success in the estoppel claim. Neither party subsequently asked his Honour to make findings.

Conclusion

14. On the issue of costs, there was a supplementary question of whether they should be apportioned such that the plaintiff did not receive all of his costs but rather that they should be apportioned in accordance with the time spent arguing the plaintiff's unsuccessful claims under the *Succession Act*. Slattery J in *Sedgwick v Varzonek* (No. 2) [2015] NSWSC 1613 accepted this argument at [30]. However, his Honour relied on a *Calderbank letter* and an *Offer of Compromise served by the plaintiff prior to the hearing*, for \$120,000, in deciding that the defendant would pay the plaintiff ordinary costs up to the offer and indemnity costs thereafter. This decision highlights the importance of Calderbank letters and settlement offers for these purposes.

15. Finally, this case usefully highlights that there is often more than one way to bring a claim against a deceased person's estate where the claimant believes they have missed out on an entitlement to a share of the estate.

BIOGRAPHY

Allan Blank

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Allan Blank studied law in South Africa where he was admitted as an attorney in 1992. He joined the Johannesburg Bar in 1994. After moving to Australia, he was admitted in NSW as a lawyer in 1999 and first called to the NSW Bar in 2001. He has published numerous articles in the NSW Law Journal and presented papers in various Law Societies. He practices in a wide range of areas. Outside of the law he enjoys tennis and running (regularly participating in the City to Surf), cooking and reading.

Alun Hill

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Alun Hill was admitted as a lawyer in 1980 and called to the NSW Bar in the same year. He practises mainly in probate and equity, in which he is a leading practitioner and regularly presents seminars. He has been retained in various matters by the NSW Trustee and Guardian over the past 30 years.

BIBLIOGRAPHY

Focus Case

Sedgwick v Varzonek [2015] NSWSC 1275

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_16-09-2015_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/55e6753fe4b0012d84a7585e>

Cases

Sedgwick v Varzonek (No. 2) [2015] NSWSC 1613

Legislation

Interpretation Act 1987 (NSW)

Succession Act 2006 (NSW)