

Article Information

Authors: Donna Benge, Rod Jones

Service: Estate & Succession Planning

Sector: Private Clients

No second bite at cherry for former spouse - Lodin v Lodin overturned on appeal

We previously reported on a family provision claim by a former spouse, who had a property settlement with the deceased more than 20 years earlier,

We previously reported on a family provision claim by a former spouse, who had a property settlement with the deceased more than 20 years earlier, which resulted in an award of \$750,000.00 to her in the NSW Supreme Court on 25 January 2017.

The Court in *Lodin v Lodin; Estate of Dr Mohammad Masoud Lodin* [2017] NSWSC 10 held that there were factors warranting Magdalena Lodin as the former spouse being regarded as a natural object of the deceased's testamentary bounty and thus warranting her making the application. The factors included the enduring impact of the relationship on her well-being, her custodial responsibility for their daughter, the relatively modest size of the pool of assets at the time of the divorce and the fact that the only other person with a claim on the large estate was their daughter.

Justice Brereton found that these circumstances justified concluding that Ms Lodin was left without adequate provision for her proper maintenance and advancement in life.

An appeal was brought by Rebecca Lodin, the daughter of the deceased, who was the administrator of the deceased's estate and, under the legislation relating to the distribution of an estate on intestacy, was entitled to receive the whole of the deceased's estate. The value of the estate exceeded \$5 million.

Her appeal grounds stated:

"His Honour's decision is so divorced from reality, so unrepresentative of community standards or expectation, and so totally inconsistent with the objects and principles of family provision legislation as to be wrong and thus deserving of appellate correction."

The Court of Appeal held that Justice Brereton had erred in concluding that there were factors warranting Ms Lodin making the family provision application. The starting point for this decision was that an ex-spouse is not normally regarded as a natural object of testamentary recognition by the deceased.

Secondly, the Court considered that the financial affairs between the deceased and Ms Lodin were resolved by final orders of the Family Court in December 1992. Justice Sackville noted in his decision that the making of those orders does not necessarily constitute a fatal barrier to a family provision claim, but it is likely to terminate any obligation on the deceased to make testamentary provision for a former spouse.

A further factor that counted against Ms Lodin's claim was that the deceased meticulously complied with his obligations to provide financial support for his daughter. The Appeal Court dismissed Ms Lodin's argument that her care of their only child was to her detriment and enabled the deceased to flourish financially. The level of support provided by the deceased for Rebecca's maintenance and education was reasonably substantial. Furthermore, the deceased gave additional financial support from time to time extending beyond his legal responsibilities.

The Court of Appeal next considered Ms Lodin's financial circumstances at the date of the hearing and injuries she sustained in a series of motor vehicle accidents, which had a severe impact on her ability to join or rejoin the workforce. The Court held that the deceased did not have any moral duty to provide for Ms Lodin because of injuries entirely

unrelated to their relationship.

Lastly, the Court considered a relevant factor in assessing Ms Lodin's claim was her relentless persecution of the deceased. Justice Sackville noted that if Ms Lodin's persecution of the deceased was "the product of a psychiatric illness or genuine disability induced by the deceased's conduct or perhaps by the nature of their relationship" then Ms Lodin's conduct might be given relatively little weight. However, in the absence of evidence establishing a causal link of this kind, Justice Sackville determined that Ms Lodin's conduct towards the deceased counted against her entitlement to make a family provision claim against his estate. Further, the Court of Appeal stated that family provision claims should not be a forum to re-litigate family issues which had long been resolved under family law.

The fundamental question posed by section 59(1)(b) of the *Succession Act 2006* (NSW) in relation to a claim by a former spouse of the deceased is whether the claimant can be regarded as a natural object of testamentary recognition by the deceased. It is for the above reasons that the Court of Appeal overturned the decision at first instance and concluded that Ms Lodin had not established that there were factors warranting her making a family provision application.