

Article Information

Author: Rod Jones, Donna Bengé

Service: Estate & Succession Planning, Estate Administration

Sector: Not-for-Profit, Private Clients

Court's Advice to Executor

On 4 March 2020, in answer to advice sought by an executor, Justice Parker in the Equity Jurisdiction of the Supreme Court of New South Wales responded in a way that may not have been anticipated in *Application of Lewis; Estate of the late Shirley Jean Coleman* [2020] NSWSC 192.

Background

The executor of the Estate, Ms Lewis, had received correspondence from solicitors acting for an adult son of the deceased, Ms Coleman's de facto partner. A caveat lodged by the son of the de facto (also deceased) claimed that Ms Coleman had held certain real estate on a constructive trust for his father on the basis of equal repayments of a loan used to acquire that property. The executor brought an Application for Advice and Directions before the court pursuant to section 63 of the *Trustee Act* (NSW) seeking advice and directions about those allegations. Whilst those allegations and claims were ultimately settled by agreement, the executor continued with an application that her costs of bringing the Application for Advice and Directions should be paid by the estate on an indemnity basis.

Whilst Justice Parker agreed to dismiss the application following settlement, he was not inclined to make an order for the payment of the executor's costs. This was on the basis that even though the claim made by the son was hard for the executor to pin down, and seemed to have varied over time, Justice Parker was inclined to agree with the submission that the executor better ought to have followed the procedure outlined in sections 92 and 93 of the *Probate and Administration Act* (NSW). Combined, those two sections allow an executor, in the case of Ms Lewis, to advertise for claimants in respect of the assets of the estate and if none received, attract the protection upon distribution that those two sections provided. Or if a claim was received, and prosecuted by the claimant, the executor could defend that in the usual way. In doing so, the executor in defending that claim could also seek clarification of the constructive trust claim, and even seek summary dismissal should it not be able to be properly articulated.

Observations

The decision of Justice Parker is a cautionary one for executors who may be in difficulty or doubt in New South Wales about claims against the estate and the proper basis for estate distribution. It is clear from the decision that if the circumstances permit, the court would prefer executors to adopt the procedure provided for in sections 92 and 93 of the *Probate and Administration Act*, and not to seek judicial advice and directions under section 63 of the *Trustee Act*.