

Succession: 'Applications for Judicial Advice – what you need to know'

WILLS & ESTATES CPD DAY

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Scope

- Why might an executor seek judicial advice
- The nature of “relief without general administration”: O 54.02
- General principles
- Disputed questions of fact
- Procedural matters
- Discussion

Case example

Will of Roma San Marzano

4. I APPOINT as my executor and trustee my cousin **TINY TOM** ...
6. My executor and trustees hold my estate:
...
 - (c) To give my friend **BARRY BAKER-BEAN** my SPC Global Limited shares at the Australian Stock Exchange provided he survives me and if not, this gift shall form part of the rest and residue of my estate.
 - (f) To give the rest and residue of my estate to my niece, **IDA GOLD**

Case example

At date of the Will

- Testator held 250,000 shares in SPC Global Ltd

Case example

At date of death

- Deceased held no shares in SPC Global Ltd
- Did hold 1,917,500 shares in The Original Juice Co. Ltd

Case example

‘Nestle of Australia’: SPC goes for gold with three-way merger

Jessica Yun



October 2, 2024 — 5:05pm

Canned fruit and vegetable producer SPC is a step closer to building a global empire following a three-way merger with ASX-listed Original Juice Company (OJC) and powdered milk business Nature One Dairy that is set to create a \$400 million company.

The merged entity will build on the unique strengths of each business. SPC will provide OJC with extra manufacturing capacity to meet higher demand, and a broader distribution network to expand into new channels, while Nature One Dairy will deliver an export pathway to Asian customers.

Original Juice chairman Jeff Kennett and SPC chairman Hussein Rafi



Ademption

The legal question that arises is as to whether the gift has “adeemed”.

The concept of “ademption” concerns the gift of something which, although it existed as property of the testator at the time of the Will, does not so exist at the time of death. In certain cases, the gift is said to have failed as the testator, assuming being of sound mind, must have intended the gift to fail by disposing of the property.

This rule does not apply to all gifts or ‘legacies’. It requires legacies to be identified as either specific, general or demonstrative. Only in the case of specific legacies does the concept apply.

Ademption

When does a specific gift adeem or not adeem?

Where a testator has completely divested himself of particular property during his lifetime, so that at his death there is nothing which even substantially represents the description of a gift in the will, is it obvious the gift has adeemed and therefore fails: see Frigger v Frigger [2023] WASCA 103; Reynolds v Bonnici [2017] NSWSC 828 at [39(a)], [41] per Lindsay J; Trust Company Ltd v Gibson [2014] 1 Qd R 553; [2012] QSC 183 at [21] per Mullins J; Brown v Heffer (1967) 116 CLR 344; 41 ALJR 195; [1967] HCA 40 at 348 (CLR) per Barwick CJ, McTiernan, Kitto and Owen JJ.

Why might an executor seek judicial advice

Case Example

- Is the gift of the SPC Global Limited shares a specific gift?
- Is there property answering the description of “*my SPC Global Limited shares at the Australian Stock Exchange*”?
 - Can it be said that the shares in The Original Juice Co. Ltd are in substance the SPC Global Ltd shares?
- If not, the gift adeems and therefore fails.
- The OJC shares are valued at \$345,150.
- Barry takes the gift if they are.
- Ida takes the gift if they are not.

Why might an executor seek judicial advice

Case Example

- Order 54.02 – the only statutory basis in Victoria for a personal representative of a deceased estate or trustee of a trust to seek the advice and directions of the court: ***Morris v Smoel* [2013] VSCA 11**
- Determine whether or not the gift has addeemed.
- Protection to the personal representatives, as well as protecting creditors or beneficiaries of the estate (*David v Frowd* (1833) 1 MY & K 200 at 208; 39 ER 657 at 660); ***Longboat Holdings Groupno3 v Zacole Pty Ltd* [2021] VSC 280.**

Why might an executor seek judicial advice

- Testator left will appointing Mr Jackson as executor and primary beneficiary with alternate appointment and gift over provision to his former wife.
- Online relationship with party in USA – was “Mr Jackson” a real person in the manner contemplated by the deceased or at all?
- Is the plaintiff in her capacity as executor of the estate of the deceased entitled to distribute the residuary estate to herself pursuant to cl 5 of the will?
- If not, to whom should the residuary estate be distributed?
- **Re the will of William Ian Southey [2025] VSC 801**

Why might an executor seek judicial advice

- **Construction question - Meaning of 'personal chattels'** on intestacy – five luxury motor cars – whether used for 'business purposes' - Answer: Yes - the luxury cars which formed part of the inventory of assets were personal chattels.
- **Trusts question** – Whether... the estate of Nicola Stagliano was a beneficiary ... of the Stagliano Family Trust Deed
- **Re Estate of Stagliano [2025] VSC 39**

Why might an executor seek judicial advice

Request for approval of sale of assets including to executors -
Where person under a legal disability yet to receive settlement entitlements - Claim by executors for costs of administration and this proceeding on a trustee basis – Failure to provide adequate accounting in respect of estate – Judicial advice withheld.

Re Kelly; Kelly and Anor v Denney and Anor [2021] VSC 580

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Why might an executor seek judicial advice

Application for judicial advice – **Forfeiture rule** – Whether rule applied to prevent the defendant taking benefit under will - Where defendant convicted of the offence of manslaughter of the deceased.

Re Estate of TCW (a pseudonym) [2024] VSC 569

Why might an executor seek judicial advice

Charitable trust — Testamentary trust — Charitable institutions named in deceased's will no longer in existence — Whether charitable purpose of those institutions continued through defendant charitable institutions — **Whether defendant charitable institutions successors to institutions named in the will.**

Re Estate of Henry Brough Smith; Perpetual Trustee Company Ltd v Uniting (Victoria and Tasmania) Ltd & Ors [2020] VSC 378

Why might an executor seek judicial advice

Application for judicial advice – **Sale of land to beneficiary** under will
– Capital Gains Tax implications – Power of appropriation – Equitable setoff – Interlocutory injunctive relief refused.

Seeking interlocutory injunctive relief under O 54 was novel but failed for other reasons.

Mole v Mole [2021] VSC 752

Why might an executor seek judicial advice

WILLS – **Construction** – General principles of construction of wills – *Re Melbourne; Wall v Wathen* [2016] VSC 514 and *Fell v Fell* [1922] HCA 55; (1922) 31 CLR 268, considered and applied – Section 34 of the Wills Act 1997 (Vic) – Where the property cannot be subdivided in accordance with the testator's intention – *Garbett v Bear* [2015] NSWSC 1524, referred to – **Where gift did not exist in a transferrable form – Gift fails for uncertainty** – *Bakranich v Robinson* [2005] WASC12 referred to – Alternatively, principle of ademption applies – *Re Blake* [2009] VSC 184 referred to – Gift fails and falls into the deceased's residuary estate – Whether the gift is in addition to the beneficiary's one-third share of the estate.

***Bunting v Juratowitch: IMO the estate of Isabella Ballard, deceased* [2019] VSC 343**

Why might an executor seek judicial advice

Orders by consent discharging the defendant as executor and trustee of the estate of the deceased and appointing the plaintiff.

Defendant failed to provide explanation of how \$90,912.03 was spent, despite considerable opportunity

Summons seeking the following orders, *inter alia*: pursuant to order 54, a **direction that the plaintiff would be justified in deducting \$90,912.03 from the defendant's share of the estate ;**

McDonnell v McDonnell [2021] VSC 536

Why might an executor seek judicial advice

Judicial advice as to **the effect of two unregistered transfers of land** and an accompanying statutory declaration

The land the subject of the Transfers comprised three parcels of land near Mildura which were all held by the deceased and the defendant, his widow, as joint tenants

Transfers purport to transfer the deceased's fee simple interest in each parcel from himself to himself in consideration of 'My Desire To Sever Joint Proprietorship'.

By his Will, the Deceased appointed his sister, the plaintiff, as executrix and trustee of his estate and after leaving to the defendant, his widow, a life estate in their home, one of the three parcels of land the subject of the Transfers, he left the residue of his estate to the plaintiff.

Avery v Manno (2020) 62 VR 281; [2020] VSC 605

The nature of “relief without general administration”: O 54.02

[I 54.02] 54.02 Relief without general administration

(1) A proceeding may be brought for any relief which could be granted in an administration proceeding and a claim need not be made for the administration or execution under the direction of the Court of the estate or trust in respect of which the relief is sought.

The nature of “relief without general administration”: O 54.02

- (2) Without limiting paragraph (1), a proceeding may be brought for—
- (a) the determination of any question which could be determined in an administration proceeding, including any question—
- (i) arising in the administration of an estate or in the execution of a trust;
- (ii) as to the composition of any class of persons having a claim against an estate or a beneficial interest in an estate or in property subject to a trust; or
- (iii) as to the rights or interests of a person claiming to be a creditor of an estate or to be entitled under the will or on the intestacy of a deceased person or to be beneficially entitled under a trust;

The nature of “relief without general administration”: O 54.02

- (b) an order directing an executor, administrator or trustee to—
 - (i) furnish and, if necessary, verify accounts;
 - (ii) pay funds of the estate or trust into court; or
 - (iii) do or abstain from doing any act;
- (c) an order—
 - (i) approving any sale, purchase, compromise or other transaction by an executor, administrator or trustee; or
 - (ii) directing any act to be done in the administration of an estate or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed under the direction of the Court

General principles

Avery v Manno (2020) 62 VR 281; [2020] VSC 605

Rule 54.02 is the only statutory basis in Victoria for a personal representative of a deceased estate or trustee of a trust to seek the advice and directions of the court

The procedure is a summary procedure, intended to enable questions arising in the administration of an estate or a trust to be resolved cheaply and simply

Operates as an exception to the court's ordinary function of deciding disputes between competing litigants

General principles

The summary nature of the procedure is important to an understanding of the evidence the Court is entitled to rely upon in giving its advice. That evidence is ordinarily untested

The executor or trustee generally places all relevant circumstances before the Court and seeks an opinion, advice or direction that in those circumstances the trustee would be justified in taking a certain course

It is a mistake to think that, on an application for judicial advice, a trustee must necessarily 'prove' facts according to a certain standard of proof to enable findings of fact to be made as in the case of adversarial litigation.

General principles

Where an executor or trustee is in doubt as to the course of action it should adopt, it is always entitled to take the opinion of the court as to what it should do. If in doubt as to whether or not it should take legal proceedings, then it is entitled to apply to the court for directions on the matter

The provision for a trustee to obtain judicial advice about the prosecution or defence of litigation is a recognition of both the fact that the office of trustee is ordinarily a gratuitous office, and the fact that a trustee is entitled to an indemnity for all costs and expenses *properly* incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of litigation

General principles

It operates as an exception to the court's ordinary function of deciding disputes between competing litigants. It affords a facility of giving 'private advice' because its function is to give personal protection to the trustee

There is but one jurisdictional bar to relief: the applicant must point to the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument

General principles

An uncertain factual position may be a factor relevant to a decision not to grant judicial advice but to let the matter be examined in conventional litigation

It is the usual practice for the Court to be assisted on an application for judicial advice by being provided with a legal opinion

Disputed questions of fact

- It is a matter for the exercise of the court's discretion whether it is appropriate to give the advice sought where there are some controversial facts.
- The only jurisdictional bar to relief is that the plaintiff must point to the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument" (*Avery v Manno*).

Procedural matters- [I 54.03] 54.03 Parties.

In an administration proceeding or a proceeding referred to in Rule 54.02 —

- (a) all the executors of the will of the deceased or administrators of the estate or trustees of the trust, as the case may be, shall be parties;
- (b) where the proceeding is brought by executors, administrators or trustees, any of them who does not consent to being joined as a plaintiff shall be made a defendant;
- (c) notwithstanding anything in Rule 9.03(1), and without limiting the powers of the Court under Order 9, all persons having a beneficial interest in or claim against the estate or having a beneficial interest under the trust, as the case may be, need not be parties, and the plaintiff may make such of those persons parties as the plaintiff thinks fit;

Costs

Trustees and administrators are generally entitled to be indemnified from the fund for necessary and reasonable costs incurred in the proper administration of the trust, including accounting, taxation, and legal advice directly related to the administration and compliance with statutory obligations.

However, indemnification for costs associated with seeking judicial advice is not automatic.

The Court will scrutinise whether the costs were reasonably incurred, whether they fall within the anticipated scope of administration expenses, and whether the application was necessary.

For example, in *Camping Warehouse*, only costs directly related to successful aspects of the application for judicial advice were allowed to be recouped; costs related to unsuccessful or unnecessary claims were not (***Camping Warehouse v Downer EDI - Administrator's second application for judicial advice* [2017] VSC 660**)

Conclusions

Judicial advice under Order 54 is a valuable safeguard for executors, trustees and administrators facing genuine uncertainty or risk.

Applications should be carefully framed to address real and specific questions; unnecessary or speculative applications may not attract indemnity for costs.

Trustees and administrators should expect to justify their claims for indemnification, demonstrating that expenses were necessary, reasonable, and not already covered by agreed remuneration.