Critical cases that every wills & estates lawyer should know: Part 2

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The commencement of an IFP claim requires filing and personal service within 6 months from Probate. The manner of service must be actively monitored. A Summons in support of an application for an extension must be endorsed with the request for the extension.

A series of 2018 Full Court judgments dealing with practical problems arising out of claims under the *Inheritance (Family Provision) Act, 1972 (SA)* (IFP Act) contain important lessons for all practitioners working in this area. The judgments are:

Miller v Miller [2018] SASCFC 40 – 23 May 2018

Brooks v Young [2018] SASCFC 81 – 16 August 2018

Green v Ellul [2018] SASCFC 100 – 26 September 2018

This article discusses *Miller v Miller* and *Green v Ellul*. Refer back to the November Riskwatch for discussion about *Brooks v Young*.

MILLER V MILLER

Colin Miller, Cheryl Miller and Robert Miller were the adult children of John and Elise Miller. John and Elise had mutual wills which excluded Colin. Elise died on 12 April 2013 and in this context the parties were already represented by solicitors by the time John died on 1 December 2014. Probate was granted to Cheryl in respect of John's will on 24 February 2015.

The solicitors for Colin were instructed to make an application for provision from the estate pursuant to the IFP Act. On 21 August 2015, the application was filed. On 24 August 2015, the last day, the application was left at the reception desk of the firm known to be acting for Cheryl (**Firm A**).

The Problem

The file principal for Cheryl was not in the office on 24 August 2015. Firm A never acknowledged acceptance of service. Firm A's instructions were terminated. A Notice of Address for service was filed by Cheryl's new solicitors (Firm B) a month later. A Defence was filed two weeks after that. Cheryl did not plead that Colin's application was statute barred until a Second Defence was filed, 12 months later, on 9 September 2016.

Most of John's estate had been distributed within 6 months of Probate and therefore the primary focus was not on the extension application but instead on whether it could be established that service had, in fact, occurred on 24 August 2015.

The Attempt to Establish Service

Section 17(1) of the IFP Act confers a power to make rules but no rules have been made in respect of service. Section 17(2) of the IFP Act calls up the *Supreme Court Rules* (**SCR**). SCR66(1) requires a primary originating process to be served personally. SCR67 sets out how personal service is to be effected.

It was contended on behalf of Colin that;

1. Firm A had instructions to accept service and therefore by delivery to Firm A;
   a. service was effected by agent by operation of SCR65;
   b. Firm A had accepted service by operation of SCR67(1)(c);
2. Under SCR117, the Court could (and should) dispense with the requirement within SCR67(1)(c) that Firm A acknowledge acceptance of service.
3. Firm A was already the solicitor on the record in respect of proceedings issued in the context of Elise's estate and Firm A accepted service by operation of SCR24.
4. Cheryl's delay in raising the time point gave rise to an estoppel.

The Trial Judge found, as a matter of fact, that Firm A had instructions to accept service but that service had not been effected. This decision was upheld on appeal by majority (Kourakis CJ, with whom Nicholson J agreed).

In respect of SCR65, it was reasoned that since SCR65(1) says *A document to be served*…(emphasis added), an application for permission to serve on an agent must be made before service on the agent (per Kourakis CJ at [13]; per Bampton J at [118]). In fact, the Chief Justice went on to say that even if SCR65(1) could generally work retrospectively, it could not do so in the context of an IPF claim [14].

In respect of SCR67(1)(c), it was held that the fact of Firm A's instructions to accept service was in fact irrelevant because the rule requires an express act of acceptance by the solicitor (per Kourakis CJ at [19]; per Bampton J at [122]). Colin's argument in respect of SCR117 was raised only on appeal. In this respect the appeal Court was divided. The Chief Justice, reasoned that discretion in respect of the operation of the rules of Court could not undermine the time limit contained in section 8(1) of the IFP Act ([21]-[23]). Justice Bampton dissented on this issue ([129]). Justice Bampton also concluded the filing of the defence by Firm B cured the irregularity ([143]) and that Cheryl had submitted to the jurisdiction ([158]).

In respect of SCR24, the Court said that the presumptive authority to accept service under that rule operated only in respect of the proceedings on foot and not in respect of a new action (per Kourakis CJ at [24]; per Bampton J at [114]-[116]).

The Lesson

The Court was not unanimous in respect that attempt to cure irregularities in service however *Miller v Miller* has the weight of a Full Court authority and its majority conclusions will prevail in respect of the operation of SCR24, SCR65, SCR67 and SCR117.

It remains to be seen what the decision might be if there were an attempt to use SCR69 (the power to allow presumptive service). Unlike, SCR65, it does not contain the words *to be served* and its expressed words do not exclude retrospective operation. It leaves open the possibility that a summons delivered within time might be the subject of an order for presumptive service retrospectively.

The real lesson, of course, is that section 8 of the IFP Act is considered to be a code in respect of IFP Act claims. Practitioners working in this area should be actively managing the issue of personal service well ahead of time and sufficiently ahead of time to use the rules of Court prospectively where there are genuine obstacles to effective service.

GREEN V ELLUL

Mary Ellul had seven children, six of whom survived her when she died on 18 September 2016. In her will dated 4 February 2011, Mary appointed two children as executors (executor beneficiaries) and she left $1,000 of her $282,884.73 estate to each of the children who were not executor beneficiaries and the remainder of her estate to the executor beneficiaries. On 12 January 2017, Probate was granted to the executor beneficiaries. On 10 April 2017, the executor beneficiaries received notice from three of their four siblings (claimants) that a claim was to be made under the IFP Act.

The executor beneficiaries retained Firm A. The claimants retained Firm B. On 20 June 2017, Firm A told Firm B that it had instructions to accept service. On 10 July 2017, an application for provision was filed. The summons was served on 13 July 2017, one day out of time.

The Problem

The summons, although served out of time, was not endorsed with an application for an extension of time. Between 14 July 2017 and 26 July 2017, the executor beneficiaries, distributed the lion's share of the estate. On 18 September 2017, the claimants filed an amended summons pursuant to SCR54 which expressly sought an extension of time.

The Attempt to Establish an Application for an Extension before Distribution

Section 8(5) of the IFP Act provides that distribution of estate before an application for an extension of time shall not be disturbed. For any real benefit to come of an application for an extension of time, the claimants had to establish that their application had commenced prior to 14 July 2017.

It was contended on behalf of the claimants that:

- An application for an extension of time had been made on 13 July 2017 because;
  - the summons that had been filed on 13 July 2017 of itself contained an implicit application for an extension of time; or
  - the amendment of 18 September 2017 was operative from 10 July 2017 under the relation back doctrine.

In respect of the asserted implicit application for an extension of time in the first summons, whereas the Master at first instance had found in favour of the claimants reasoning that a summons served out of time must, in the circumstances, contain an application for an extension, the appeal Court allowed the appeal. Justice Stanley explained that (i) the scheme of the IFP Act provides that an application for an extension is a discrete claim from the substantive claim and thus both claims are to be apparent ([47]-[49]); (ii) SCR38(3)(a) provides that an originating process must bear any endorsement required by statute and SCR99(1)(d) requires any statement of claim to state the remedy that is sought ([53]-[54] and (iii) in any event there was nothing on the face of the summons from which to infer an application for an extension of time and given the onus on the executors to distribute, they must be left in no doubt ([55]-[56]).

The operation of the relation back doctrine was not pursued on appeal ([32]). It is speculated that this was because the amended summons had not been served before 14 July 2017.

The Lesson

We again see that the Court was not unanimous in of respect attempts to cure irregularities in the commencement of IFP claims. There was however consensus in Full Court and its conclusions will prevail in respect of the fact that a summons and its supporting document must expressly claim any extension of time that is sought.

It remains to be seen if SCR54 could effectively be used in the circumstances that service has occurred prior to distribution. The Master had expressly referred to High Court authority ([44]) which acknowledged the relation back principal in the context of the endorsement of a summons (albeit under other legislation). It leaves open whether, and to what extent, any summons could legitimately be endorsed with an application for an extension of time prior to the failure of service.

The related cost decision, *Green v Ellul No.2* [2018] SASCFC 105 contains, respectfully, an excellent exposition of the principles operating in respect to the costs of applications to extend time to make IFP claims. It suggests that where the substantive claim is even possibly meritorious, IFP claimants should not be discouraged from attempting to make out their applications for an extension for fear of having to pay the costs of the estate.